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TREATISE

ON THE

PRACTICE OF COURTS OF ADMIRALTY

IN

CIVIL CAUSES OF MARITIME JURISDICTION;

WITH

AN APPENDIX

CONTAINING

RULES IN THE ADMIRALTY COURTS OF THE UNITED STATES,
AND A FULL COLLECTION OF PRACTICAL FORMS.

By ANDREW DUNLAP,
ATTORNEY OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

SECOND EDITION, WITH NOTES AND ADDITIONS,

By SAMUEL FALES DUNLAP,
COUNSELLOR AT LAW.

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TO

THE HON. JOHN DAVIS, LL. D.,

JUDGE OF THE DISTRICT COURT

OF THE UNITED STATES,

FOR THE DISTRICT OF MASSACHUSETTS,

THIS WORK

IS INSCRIBED,

AS A TESTIMONY OF HIS RESPECT AND REGARD,

BY THE AUTHOR.

ERRATA.

Page 14, at the bottom, "Rules of the Courts of the United States," &c., should read "General Rules of the Supreme Court of the United States applicable to Proceedings," &c.

Page 44, note, supply the word "it" after "legal presumption is that," so as to read "the legal presumption is that *it* is received," &c.

Page 190, the marginal paging 206 should be 207.

Page 270, for "opened" read "open."

PREFACE

TO THE SECOND EDITION.

In this Edition is contained the whole of Dunlap's Admiralty Practice, as published in the First Edition. Notes of later cases have been added, and a large amount of new matter, consisting of Statutes, Court Rules, &c., has been thrown into the Appendix.

Acts of Congress have been incorporated with the body of the work, when this has been deemed advisable: some may, however, be found at the beginning of Part I. of the Appendix.

The valuable collection of Forms which accompanied the First Edition, is still retained.

S. F. DUNLAP.

37 *Wall street, August* 1, 1850.

PREFACE

TO THE FIRST EDITION.

THIS work was written by one, the whole period of whose professional life has been engaged in the active scenes of the Profession, and who has had few opportunities, and little leisure, for literary pursuits, which are as necessary to form a good writer on legal, as on other subjects. It is also his first effort as an author, and in all probability will be the last. These are his excuses for the defects of style and arrangement, which may be found in this work. But he hopes it will prove to be practically useful, particularly to his younger brethren of the Profession.

These remarks are all which the Author would have offered to the Profession respecting himself and his work, were it not that he is under obligations to another, which both inclination and justice require him publicly to acknowledge. About the time when the body of the work was completed, and the Author was preparing to give it a last revision, as it went through the press, he was attacked by a most severe illness, from which he has not recovered, except in a very slight degree. He was therefore under the necessity of committing all the cares of the publication of this book to

CHARLES SUMNER, Esq., the Reporter of the decisions of the Circuit Court of the United States for the First Circuit, who has discharged the kind service with the zeal of a sincere friend, and the accuracy of an excellent lawyer.

A. D.

Salem, July 23, 1835.

The foregoing Preface was dictated by Mr. Dunlap only four days before his death. The severe illness, to which he alludes as having attacked him, very soon gained the victory, and the present work was left in the press, and still unfinished, in the charge of the Editor. Upon him devolved the duty of completing, and finally delivering it to the public. The whole Appendix, and the Indexes, were yet unprepared. The Editor found it necessary to devote no little time and attention to the Practical Forms, which make the most important part of the Appendix. An attempt has been made, particularly in the preparation of the Second Part of the Precedents of Pleadings, being those in cases where private rights are concerned, to remedy the looseness and inaccuracy which have so strongly marked the Admiralty Pleadings of our country. The general idea of some of these has been taken from a valuable manuscript relating to the forms and proceedings in the English Admiralty, which was obtained many years ago by an American lawyer then in England, the Editor having endeavoured, by alterations in the address and the conclusion of the libels and in other particulars, to adapt them to the Practice of our

Admiralty Courts. Others of these Precedents have been drawn by the Editor, to meet the facts of different Cases to be found in the Reports. He trusts, that the whole collection may not be without its utility, in furnishing the means of an approximation to some uniformity in the Pleadings of the Admiralty Courts of the United States.

Thus much the Editor has deemed it his duty to state in regard to himself. He would do injustice to his own feelings, and to the natural interest which every reader takes in the life and character of the Author, whose work he is perusing, if he did not embrace this occasion to mention some particulars in memory of the Author of the present treatise. A few of the most important dates of a life, though short, of active professional exertions, with a few leading features of character, may properly be here brought together with plainness, as in a monumental inscription; nor will the language of eulogy be required.

Andrew Dunlap, only son of the late James Dunlap, a respectable merchant of Salem, was born in that town on the 21st of September, 1794. From his earliest childhood he was considered by his instructors as a boy of brilliant promise. He was graduated at Harvard College in 1813, and immediately entered upon the study of law in the office of John Pitman, Esq., then a Counsellor of Law, residing in Salem, and now the District Judge of the United States for the District of Rhode Island. On the completion of his Law studies, which he pursued with much ardor, he entered upon his professional life in his native town. He soon became distinguished for his eloquence, and the zeal with which he

engaged in the various affairs that interested him. In 1819, he delivered an Oration before the young men of Salem, in commemoration of American Independence, which was much admired at the time, and was the occasion of complimentary letters to the young author, from the late Presidents, John Adams and Thomas Jefferson. In 1820, he removed to Boston. Here his effective eloquence made him a popular advocate, particularly in criminal cases, and opened to him a wide field of professional practice. In 1822, and again in 1832, he delivered Orations, in Boston, in commemoration of American Independence. He was strongly attached to the old Republican party, and was a favorite speaker at their political meetings. At an early period he advocated the election of General Jackson to the Presidency, and continued friendly to his administration to the day of his death. In March, 1829, he was appointed by President Jackson, Attorney of the United States for the District of Massachusetts. The important duties of this office he discharged, until within a short time of his death, with professional courtesy most winning towards the bar and the bench, with generosity unrivalled towards prisoners, and with clearness and fidelity unquestioned towards the government. These duties he resigned a few months before his death, feeling admonished by the illness which finally terminated his life, and which was then casting its shadows over his path, to retire from active labor, and not choosing "to lag superfluous" in his office, when the power of fully sustaining its burdens no longer remained. His resignation drew from Mr. Justice Story and Judge Davis, letters expressive of their affectionate personal regard, and of their distinguished approbation of his official

conduct. The hope was indulged by his friends, that a journey to the South would restore him; but it proved unavailing, or only protracted for a short period the hour of his final departure. He returned from Washington, whither he had gone, to Salem, the place of his birth and early education, where he died, in the bosom of his family connexions, July 27th, 1835.

One of his last sentiments, uttered at that period when the mind looks with clearness through all the events of life, even though the eye of the countenance be dim, is worthy of remembrance. He said, that "one of his happiest reflections at that moment was, that, in the whole course of his professional life, he had never pressed hard upon any man." It need hardly be added, that the author of such a sentiment must have been a man of generous impulses. All his feelings were strong, and were a great source of his eloquence. What he did, he did with his whole heart. And no man's heart beat quicker than his at the call of patriotism or philanthropy. He was fearless in his conduct, kind towards inferiors, and frank and amiable towards all. His public addresses were in a style, vigorous, warm, and often impassioned, like his whole character. In the responsible duties of a wide practice, he was as invariably prompt, conciliating, and honorable, as he was able, learned, and indefatigable. His arguments to the Court and jury often attested, not only a large acquaintance with the books of his profession, but also with those of literature and general knowledge. Some of them are preserved in the Reports of the Circuit Court of the United States for the First Circuit, and in those of the Supreme Court of Massachusetts. In his defence of Abner Kneeland, who

was charged with the crime of Blasphemy, will be found a manly exposition of the Rights of Conscience, which will be read with interest long after the excitement of the trial shall be forgotten.

CHARLES SUMNER.

Boston, August 1st, 1836.

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PRACTICE

IN

ADMIRALTY.

CHAPTER I.

JURISDICTION OF ADMIRALTY COURTS IN CIVIL CASES.

THE maritime courts of the continent of Europe anciently included jurisdiction of all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessities of his ship; of agreements made by the master with merchants or by merchants with the master; of goods found on the high seas, or on the shore; of the armament or equipment of ships, galleys, or other vessels, and generally of all other contracts declared in the customs of the sea.[1]

[1] De Lovio v. Boit, 2 Gall. R. 400.

In France there were formerly no Admiralty Judges, 2
except the Lieutenants of the Admiral, and other officers appointed by him. This was the case until 1554, when Henry II. erected courts of Admiralty without prejudice to the right of nomination by the Admiral; since which time the officers of this jurisdiction have been officers royal and officers of the Admiral. There were at first but few courts of Admiralty established, but they have been since multiplied, and in 1717 were extended to all the French Colonies.[1]

The following extract from the *Ordonnance de la Marine* of Louis XIV. (*Liv. I. Tit. II.*) defined the jurisdiction of the courts of Admiralty in France.

"1. Les juges de l'amirauté connaîtront privativement à tous autres, et entre toutes personnes de quelque qualité qu'elles soient, même privilégiées, français et étrangers, tant en demandant qu'en défendant, de tout ce qui concerne la construction, les agrès et apparaux, avitaillement et équipement, ventes et adjudications des vaisseaux.

"2. Déclarons de leur compétence toutes actions qui procèdent de chartes-parties, affrétemens ou nolissemens, connaissemens ou polices de chargement, fret ou nolis, engagement ou loyer de matelots, et des victuailles qui 3
leur seront fournies pour leur nourriture, par ordre du maître, pendant l'équipement des vaisseaux, ensemble des polices d'assurances, obligations à la grosse aventure, ou à retour de voyage, et généralement de tous contrats concernant le commerce de la mer, nonobstant toutes soumissions et priviléges à ce contraires.

[1] Valin, Comment. sur l'Ordon. de la Mar. 125. (Ed. 1829.)

"3. Connaîtront aussi des prises faites en mer, des bris, naufrages et échouemens, du jet et de la contribution, des avaries et des dommages arrivés aux vaisseaux et aux marchandises de leur chargement, ensemble des inventaires et délivrances des effets délaissés dans les vaisseaux de ceux qui meurent en mer.

"4. Auront encore la connaissance des droits de congé, tiers, dixième, balises, ancrage et autres appartenant à l'amiral, ensemble de ceux qui seront levés ou prétendus par les seigneurs ou autres particuliers voisins de la mer, sur les pêcheries ou poissons, et sur les marchandises ou vaisseaux sortant des ports ou y entrant.

"5. La connaissance de la pêche qui se fait en mer, dans les étangs salés et aux embouchures des rivières, leur appartiendra; comme aussi celle des parcs et pêcheries, de la qualité des rets et filets, et des ventes et achats de
4 poisson dans les bateaux, ou sur les grèves, ports et havres.

"6. Connaîtront pareillement des dommages causés par les bâtimens de mer, aux pêcheries construites même dans les rivières navigables, et de ceux que les bâtimens en recevront, ensemble des chemins destinés pour le halage des vaisseaux venant de la mer, s'il n'y a règlement, titre ou possession contraires.

"7. Connaîtront encore des dommages faits aux quais, digues, jetées, palissades et autres ouvrages faits contre la violence de la mer, et veilleront à ce que les ports et rades soient conservés dans leur profondeur et netteté.

"8. Feront la levée des corps noyés, et dresseront procès-verbal de l'état des cadavres trouvés en mer, sur les grèves

ou dans les ports; même de la submersion des gens de mer étant à la conduite de leurs bâtimens dans les rivières navigables.

"9. Assisteront aux montres et revues des habitans des paroisses sujettes au guet de la mer, et connaîtront de tous différends qui naîtront à l'occasion du guet; comme aussi des délits qui seront commis par ceux qui feront la garde des côtes, tant qu'ils seront sous les armes.

"10. Connaîtront pareillement des pirateries, pillages et désertions des équipages, et généralement de tous crimes et délits commis sur mer, ses ports, havres et rivages. 5

"11. Recevront les maîtres des métiers de charpentier de navires, calfateur, cordier, trevier, voilier et autres ouvriers travaillant seulement à la construction des bâtimens de mer et de leurs agrès et apparaux, dans les lieux où il y aura maîtrise, et connaîtront des malversations par eux commises dans leur art.

"12. Les rémissions accordées aux roturiers pour crimes dont la connaissance appartient aux officiers de l'amirauté, seront adressées et jugées ès siéges de l'amirauté ressortissant nûment en nos cours de parlement.

"13. Les officiers des siéges généraux de l'amirauté aux tables de marbre connaîtront, en première instance, des matières tant civiles que criminelles contenues en la présente ordonnance, quand il n'y aura pas de siéges particuliers dans le lieu de leur établissement, et par appel, hors les cas où il écherrait peine afflictive, auquel cas sera notre ordonnance de 1670 exécutée.

"14. Pourront évoquer des juges inférieurs, les causes

qui excéderont la valeur de trois mille livres, lorsqu'ils seront saisis de la matière par l'appel de quelque appointement ou interlocutoire donné en première instance.

6 "15. Faisons défenses à tous prévôts, châtelains, viguiers, baillis, sénéchaux, présidiaux et autres juges ordinaires, juges-consuls, et des soumissions aux gens tenant les requêtes de notre hôtel et du palais, et à notre grand conseil, de prendre aucune connaissance des cas ci-dessus, circonstances et dépendances; et à nos cours de parlement d'en connaître en première instance; même à tous négocians, mariniers et autres, d'y procéder pour raison de ce, à peine d'amende arbitraire."[1]

In England the Admiralty Court, at an early period, exercised jurisdiction over all questions of prize, and those relating to maritime contracts and to navigation.[2] The office of the Lord High Admiral originally comprised civil, rather than military duties, and its particular object was the jurisdiction of commerce,—having the same power at sea as other magistrates had on land,—and a general jurisdiction of all affairs civil and criminal on the seas.[3] In the reign of Edward I., an ordinance was made, that every contract between merchants, and merchant and mariner, beyond sea, or

7 within the flood-mark, should be tried before the Admiral; and, in an ancient record in the Tower, an immemorial jurisdiction of the Admiralty, in all causes arising on the British seas, is declared.[4] In the Black Book of the Admiralty, which is supposed to have been compiled in the

[1] Valin, Comment. sur l'Ordon. de la Mar. 4–6. (Ed. 1829.)
[2] The Emulous, 1 Gall. R. 574. [3] The Little Joe, Stewart's Admr. R. 396.
[4] De Lovio v. Boit, 2 Gall. R. 402.

reign of Edward III., are ordinances prohibiting the suing of merchants, mariners, and other persons at the common law, for any thing appertaining to the marine law of ancient right; and a jurisdiction of the Admiralty in respect to torts and injuries on the high seas, and in ports, and in all cases of contracts made abroad, or within the flood-mark, is distinctly asserted.[1] The commission of the Admiral, in the reign of Edward III., gave him full power to hear all controversies in maritime causes.[2] From the ancient authorities and records it clearly appears, that, in the reign of Edward III. and before that period, the Admiralty in England exercised jurisdiction over all matters of prize; over torts on the sea, and in ports within the ebb and flow of the tide, and over maritime causes in general.[3]

In England the ancient jurisdiction of the Admiralty has been limited by certain statutes, commonly called the 8
restraining statutes. By the Statute 13 Rich. II., ch. 5, it is enacted that "the admirals and their deputies shall not meddle henceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward (III.), grandfather of our Lord the King that now is."[4] By the Statute 15 Rich. II., ch. 3, it is provided, "that of all manner of contracts, pleas, and quereles (complaints or controversies), and of all other things done or arising within the bodies of counties, as well by land, as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance, power, nor jurisdiction, but all such manner of con-

[1] De Lovio v. Boit, 2 Gall. R. 404. [2] Ibid, 406. [3] Ibid. [4] Ibid, 418.

tracts, pleas, and quereles, and all other things arising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied by the laws of the land, and not before or by the Admiral nor his Lieutenant, in any wise. Nevertheless of the death of a man, and of a maihem done in great ships, being hovering in the main stream of great rivers, only, beneath the bridges of the same rivers nigh
9 to the sea, and in none other places of the same rivers, the Admiral shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the King and of the realm; saving always to the King all manner of forfeitures and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities, and boroughs their liberties and franchises."[1]

In the construction of these restraining statutes there has been a great difference of opinion between the Admiralty and Common Law Courts, and a struggle existed for near two centuries, which was maintained with zeal and perseverance on both sides; and which resulted in limiting the Admiralty jurisdiction in England to narrow bounds. The Admiralty Courts have maintained, that these statutes merely prohibited the Admiralty from taking jurisdiction of contracts, arising wholly on land, and relating solely to affairs not maritime in their nature, and torts or injuries committed in ports, and not within the ebb and flow of the tide. The Admiralty has contended, that it has jurisdiction, notwith-

[1] De Lovio *v.* Boit, 2 Gall. R. 419.

standing these statutes, over torts and injuries upon the high seas, and in ports within the ebb and flow of the 10 tide, and in great streams below the first bridges; over all maritime contracts arising at home or abroad; and over matters of prize and its incidents.[1]

On the other hand, the Courts of Common Law have held, that the jurisdiction of the Admiralty is confined to contracts and things exclusively made and done upon the high seas, and to be executed upon the high seas; that it has no jurisdiction over torts, offences, or injuries done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are in some measure to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for the payment of money; nor of any contract, though maritime and made at sea, under seal or containing unusual stipulations.[2] And, as the Admiralty was said not to be a court of record, the power to impose a fine for a contempt, or to take a recognizance or stipulation in aid of its general jurisdiction, was denied.[3]

In the reign of James I., the following complaint of 11 the Lord High Admiral of England, against the Judges of the realm, on account of prohibitions from the Common Law Courts to the Admiralty, was presented to the King:[4]

[1] De Lovio v. Boit, 2 Gall. R. 419. [2] Ibid, 420, 421. [3] Ibid, 421.
[4] 4 Inst. 134, cap. 22.

"Certain grievances, whereof the Lord Admiral and his officers of the Admiralty, do especially complain and desire redress.

"1. That, whereas the conusance of all contracts, and other things done upon the sea, belongeth to the Admiral jurisdiction, the same are made triable at the Common Law, by supposing the same to have been done in Cheapside and such places.

"2. When actions are brought in the Admiralty upon bargains and contracts made beyond the seas, wherein the Common Law cannot administer justice, yet in these cases prohibitions are awarded against the Admiral Court.

"3. Whereas, time out of mind, the Admiral Court hath used to take stipulations for appearance and performance of the acts and judgments of the same Court: It is now affirmed by the Judges of the Common Law, that the Admiral Court is no Court of Record, and therefore not able to take such stipulations; and hereupon prohibitions
12 are granted to the utter overthrow of that jurisdiction.

"4. That charter-parties made only to be performed upon the seas are daily withdrawn from that Court by prohibitions.

"5. That the clause *non obstante statuto*, which hath foundation in his Majesty's prerogative, and is current in all other grants, yet in the Lord Admiral's patent is said to be of no force to warrant the determination of the causes committed to him in his Lordship's patent, and so rejected by the Judges of the Common Law.

"6. To the end, that the Admiral jurisdiction may receive all manner of impeachment and interruption, the rivers be-

neath the first bridge where it ebbeth and floweth, and the ports and creeks, are by the Judges of the Common Law affirmed to be no part of the seas, nor within the Admiral jurisdiction: And whereupon prohibitions are usually awarded upon actions depending in that Court for contracts and other things done in those places; notwithstanding, that by use and practice, time out of mind, the Admiral Court have had jurisdiction within such ports, creeks, and rivers.

"7. That the agreement made A. D. 1575, between the Judges of the King's Bench and the Court of 13 Admiralty, for the more quiet and certain execution of Admiral jurisdiction, is not observed as it ought to be.

"8. Many other grievances there are, which by discussing of these former, will easily appear worthy also of reformation."

The agreement of 1575, referred to, is thus: "That the Judge of the Admiralty, according to such ancient order as hath been taken by King Edward I. and his council, and according to the letters patent of the Lord High Admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of memory of man, may have and enjoy cognition of all contracts and other things rising as well beyond as upon the sea, without let or prohibition."[1]

1632 In the reign of Charles I., the following resolutions upon the cases of Admiralty jurisdiction were agreed to and subscribed 4th February, 1632, by all the Judges of his

[1] De Lovio v. Boit, 2 Gall. R. 443, *note*.

Majesty's Courts at Westminster, and the Judge of the Court of Admiralty, and the Attorney-General.[1]

"1. If suit should be commenced in the Court of
14 Admiralty upon contracts made or other things personal done beyond the seas, or upon the sea, no prohibition is to be awarded.

"2. If suit be before the Admiral for freight or mariners' wages, or for breach of charter-parties, for wages to be made beyond the seas; though the charter-party happen to be made within the realm; so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty, or if the question be made, whether the charter-party be made or not; or whether the plaintiff did release or otherwise discharge the same within the realm; this is to be tried in the King's Courts, and not in the Admiralty.

"3. If suit be in the Court of Admiralty, for building, amending, saving, or necessary victualling of a ship, against the ship itself and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm.

"4. Although of some causes arising upon the Thames beneath the bridge, and divers other rivers beneath the first bridge, the King's Courts have cognizance; yet the Admiralty hath also jurisdiction there, in the point specially mentioned in the Statute of *decimo quinto Richardi*
15 *Secundi;* and also, by exposition and equity thereof,

[1] Cro. Car. 296, (ed. 1657;) 2 Bro. Civ. & Ad. Law, 78.

he may enquire of and redress all annoyances and obstructions in those rivers, that are any impediment to navigation or passage to or from the sea; and no prohibition is to be granted in such cases.

"5. If any be imprisoned, and, upon *habeas corpus* brought, it be certified that any of these be the cause of his imprisonment, the party shall be remanded."

Upon these resolutions it should be remarked, that they were printed in the first edition of Croke's Reports; and Rolle, in his Abridgment (Vol. I., p. 533), refers to them as authority. But in this edition of Croke's Reports a declaration is prefixed by the editor, denying their authority, and in the subsequent editions they have been omitted. In Woodward *v.* Bonitham,[1] it is said that these resolutions have been denied by some Judges, and also renounced by several who are said to have subscribed them.[2]

In 1648 the following ordinance was made by the Republican government of England:

"*The Jurisdiction of the Court of Admiralty Settled.* 16

"The Lords and Commons assembled in Parliament, finding many inconveniences daily to arise in relation both to the trade of this Kingdom and the commerce with foreign parts, through the uncertainty of jurisdiction in the trial of maritime causes, do ordain, and be it ordained by the authority of Parliament, That the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel, and furniture

[1] T. Ray. R. 3.

[2] See Bee. R. 420, 436.

thereof; in all causes which concern the repairing, victualling, and furnishing provisions for the setting of such ships or vessels to sea; and in all cases of bottomry and likewise in contracts made beyond the seas, concerning shipping, or navigation, or damages happening thereon or arising at sea in any voyage; and likewise in all cases of charter-parties, or contracts for freight, bills of lading, mariners' wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors or want of laying of buoys; except, always, that the said Court of Admiralty shall not hold pleas or admit actions upon any bills of exchange, or accounts betwixt merchant and merchant or their factors.

17 "And be it ordained, That in all and every the matters aforesaid, the said Admiralty Court shall and may proceed, and take recognizances in due form, and hear, examine, and finally end, decree, sentence, and determine the same, according to the laws and customs of the sea, and put the same decrees and sentences in execution, without any let, trouble, or impeachment whatsoever, any law, statute, or usage to the contrary heretofore made in any wise notwithstanding; saving always and reserving to all and every person and persons that shall find or think themselves aggrieved by any sentence definitive, or decree having the force of a definitive sentence, or importing a damage not to be repaired by the definitive sentence given or interposed in the Court of Admiralty in all or any of the cases aforesaid, their right of appeal in such form as hath heretofore been used from such decrees or sentences in the said Court of Admiralty.

"Provided always, and be it further ordained by the authority aforesaid, that from henceforth there shall be three Judges always appointed of the said Court, to be nominated from time to time by both Houses of Parliament or such as they shall appoint; and that every of the Judges of the said Court for the time being, that shall be present at the giving of any definitive sentence in said 18
Court, shall at the same time or before such sentence given, openly in Court, deliver his reasons in law of such his sentence or of his opinion concerning the same; and shall also openly in Court give answers and solutions (as far as he may) to such laws, customs, or other matter, as shall have been brought or alleged in Court on that part against whom such sentence or opinion shall be given or declared respectively.

"Provided also, that this Ordinance shall continue for three years and no longer."[1]

Sir Leoline Jenkins, the distinguished Admiralty Judge in the reign of Charles II., in his celebrated argument before the House of Lords, (which is recommended, in Browne's Civil and Admiralty Law, to the perusal of every student,) points out the inconveniences to the public arising from the evasion of the Admiralty jurisdiction: 1. As to foreign contracts or those made abroad. 2. As to mariners' wages, freight, and charter-party. 3. As to building and victualling of ships, and as to material-men who furnish

[1] Scobell's Collection of Acts, &c., cap. 112, p. 147. This act was passed 12th April, 1648, and made perpetual by subsequent Ordinances during the existence of the Commonwealth; but it expired at the Restoration, 1660. See also Hall's Adm. Prac. xxvi.

19 materials, or supply work for the ship. 4. As to disputes between part owners.[1]

The Common Law Courts at length obtained complete concurrent jurisdiction of all causes cognizable in the Admiralty, except prize causes, which are admitted to be exclusively cognizable in Admiralty Courts.

At first the Common Law Courts "disclaimed all cognizance of things done without the bodies of the counties of the realm, and even over collateral matters, done out of the realm, which came incidentally in question upon issues regularly before the Courts. They afterwards held cognizance of contracts originating within the realm to be executed abroad; of contracts made abroad to be executed within the realm; and finally, after much hesitation and doubt, by the use of a fiction often absurd and never traversable, over all personal causes arising on the high seas or in foreign realms, without any regard to the place of their transaction or consummation. Upon what principles of the ancient Common Law this extension of jurisdiction can be supported, it is difficult to perceive. It has, however, been established by the usage and decisions
20 of ages, and now rests upon the same basis, and no other, that sustains the immemorial claims of the Admiralty."[2]

Where a tort is done upon the sea, the jurisdiction of the Admiralty is not defeated by any transaction on land or by the concurrent jurisdiction of the Courts of Common Law.[3]

[1] 2 Bro. Civ. and Ad. Law, 77, *note*.
[2] De Lovio *v.* Boit, 2 Gall. R. 422. [3] Ibid, 436.

The limited powers, now exercised by the Admiralty in England, have not been maintained without a struggle. It is held by the Common Law Courts that the jurisdiction, in cases of contracts, is confined to maritime contracts made upon the high seas, and to be there executed.[1] Even in the case of mariners' wages, it was at first held that the Admiralty had not jurisdiction, because the contract was made on land.[2] In the nineteenth year of James I., a prohibition to the Admiralty was refused, as a matter of discretion, in a case of mariners' wages, and a reason was assigned, that the case was one of "poor mariners, who might not be delayed in the Admiral's Court, and could there join in a libel, instead of being obliged to bring several actions in the Courts of Common Law."[3] But in Woodward v. Bonithan, (Sir T. Ray. Rep. 3,) the right of mariners 21
to sue in the Admiralty was denied.[4] At length it was admitted; the practice became general, and is now undisputed.[5] In a modern case, however, Sir William Scott spoke of this jurisdiction as "a kind of toleration founded on the general convenience of the practice;" but he also asserted that the exercise of such a jurisdiction had existed from the first establishment of the Court of Admiralty.[6]

The following reasons have been assigned in the Common Law Courts for the allowance to mariners of a right to sue in the Admiralty for their wages.[7] "1. That it is more convenient for seamen to sue in the Admiralty, because they may all join in one suit. 2. That by the

[1] De Lovio v. Boit, 2 Gall. R. 437. [2] Ibid. 453. [3] Ibid. [4] Ibid. [5] Ibid.
[6] The Courtney, Edw. R. 239. [7] De Lovio v. Boit, 2 Gall. R. 454.

maritime law, if the ship perish by the mariners' default, they are to lose their wages; which (it should seem from this reason) would be otherwise due at Common Law. 3. That the true reason is, that, though the contract be made on land, yet the ship is made liable for the wages. 4. That mariners' wages grow due to them
22 for labor or service done at sea, and the charter and contract at land is only to ascertain their rate. 5. That it is not on account of the service done at sea, but because *they are mariners*, and the suit is for *mariners'* wages; and therefore, if the service be done in port, and the voyage be abandoned, the mariners may still sue for their wages in the Admiralty. 6. That the jurisdiction of the Admiralty over mariners' wages is an *ancient concurrent* jurisdiction, as ancient as the constitution itself. 7. That it is expressly against the statutes of Richard II.; and is a mere indulgence, and is now founded upon the maxim *Quod communis error facit jus*, and nothing but constant practice affirms it, and it is not *de jure*, but by indulgence."

These reasons have been thus criticised by Mr. Justice Story. "A short review of these reasons may not be without use. As to the first, it cannot of itself furnish any solid ground for vesting a jurisdiction otherwise unauthorized. It is an argument merely *ab inconvenienti;* and, besides, the jurisdiction exists equally, whether one or many mariners sue. The second is founded upon a supposition that the Common Law would, in the given case, decide differently from the Maritime Law, which is not true.
23 The third is not universally true, or rather does not universally apply; for a suit may be maintained for

mariners' wages in the Admiralty, as well *in personam* as *in rem*. It is an entire mistake that its jurisdiction is in general limited to proceedings *in rem*. The fourth is in direct hostility to the construction of the Common Law, as to all other maritime contracts, and, if correct, furnishes a complete recognition of the general doctrine of the Admiralty. The fifth is a virtual contradiction of the fourth, and puts the jurisdiction upon the personal privilege of the parties, not upon the nature or the place of the service done, a distinction at war with the statutes of Richard, and not easily reconcilable with the case of Rose *v.* Walker, 2 Wils. R. 264. The sixth reason is undoubtedly well founded, and is a complete answer to the laborious commentaries of Lord Coke. But the reason is in itself of no weight, unless it is admitted that the statutes of Richard II. were not intended to abridge any part of the original rightful jurisdiction of the Admiralty, but only to check its usurpations over contracts made at land, unconnected with maritime business. In this view it has a most important bearing. The seventh and last reason is indeed extraordinary. It may be truly observed in the pointed language of Mr. 24 Douglas,[1] 'Surely it is not consonant to legal principle to hold that any usage or common error can abrogate a statute to any purpose, or give legality to what an act of Parliament expressly prohibits.'

"It may be added that all these reasons, except the fourth and sixth, have not the slightest connexion with any possible construction of the statutes of Richard II.; and the fourth and sixth, if they are correct in principle, sustain

[1] Wilkins *v.* Carmichael, Doug. R. 101, *note.*

the whole superstructure of the Admiralty jurisdiction over all maritime contracts."[1]

Until recently the Admiralty exercised jurisdiction in cases of proprietary suits, and it now entertains suits in possessory actions for the possession of ships; as in controversies among part owners, respecting the employment of ships, and over Admiralty stipulations.[2] It is said by Sir Leoline Jenkins, that "the jurisdiction of the Admiralty ought naturally to arise from the nature of the cause, and not from the place where any bargain or contract is made."[3] In torts locality ascertains the jurisdiction.[4]

25 Dr. Browne observes, with respect to the present extent of the jurisdiction of the instance Court of Admiralty, allowed by the Common Law Courts, that it is confined, in matters of contracts, to suits for seamen's wages, and those on hypothecations; in matters of tort, to actions for assault, collision, and spoil, and in *quasi* contracts to actions of part owners for security and actions of salvage.[5]

The Admiralty Court, in England, now exercises jurisdiction in the following cases, although a great portion of the powers enumerated in the commission of the Judge of the High Court of Admiralty are inoperative, and the active jurisdiction of the Court stands in need of the support of continued exercise and usage.[6]

1. In cases of prize, by virtue of its general jurisdiction, and the commission which issues when a war takes place. The jurisdiction of the instance Court is that of the ordinary,—that of the prize Court is the extraordinary jurisdic-

[1] De Lovio *v.* Boit, 2 Gall. R. 455, 456. [2] Ibid, 463.
[3] 2 Bro. Civ. and Ad. Law, 90. [4] Ibid, 110. [5] Ibid, 122.
[6] The Apollo, 1 Hagg. R. 312.

tion of the Admiralty;[1] but it is supposed that this distinction is altogether of modern origin.[2]

2. In cases of mariners' wages. 26

The Admiralty in England will entertain a suit of foreign seamen with the sanction of the Minister of the Government to which the libellants belong.[3]

By the statute of 59 Geo. III. c. 58, magistrates in England are authorized to settle disputes about wages, not exceeding in amount twenty pounds sterling, and their decision is final unless an appeal to the Court of Admiralty be interposed within seven days after the order is made; but notice of an appeal must be given within forty-eight hours after the order is made, and bail to double the amount of the wages claimed must be given. But the seamen are not deprived of a resort to any other remedy.[4]

A seaman who might have received his wages in cash abroad, and who elected to take a bill of exchange, has not a right to Admiralty process against the ship.[5] (*a*) Seamen

[1] Doug. R. 613, *note*.
[2] De Lovio *v.* Boit, 2 Gall. R. 464, 465; 2 Bro. Civ. and Ad. Law, 212.
[3] The Wilhelm Frederick, 1 Hagg. R. 140. [4] The Minerva, ibid, 54.
[5] The William Mona, 2 Hagg. R. 136.

(*a*) A seaman does not lose his lien on the vessel for his wages by taking an order on the owner or charterer for the balance due at the close of the voyage.—The Eastern Star, Ware's R. 185.

By the law of Maine, if a negotiable security is given for a pre-existing simple contract debt, the legal presumption is that it is received in payment; and that it is an extinguishment of the original cause of action. This presumption of the local law will not be enforced in Admiralty against a seaman who receives the owner's negotiable note for wages.—The Betsy and Rhoda, Daveis' R. 112; The Eastern Star, Ware's R. 187; The Barque Chusan, 2 Story's R. 467.

are the favorites of the law on account of their imbecility, and are placed particularly under the protection of the Admiralty, for they are proverbially reckless and improvi-
dent, and on all accounts requiring protection.[1] They
27 must be provided with sustenance, and their claim
for subsistence is enforced in the Admiralty; and upon a wrongful discharge abroad they have a claim to be restored to their homes, and to their support in the mean time, which is also recognised in the Admiralty.[2]

3. In cases of enforcing judgments of foreign Admiralty Courts, when the person or his goods are within the jurisdiction.[3]

4. In cases of bottomry bonds, and hypothecations of cargo and freight.[4]

In most of the countries governed by the Civil Law, repairs and necessaries form a lien upon the ship. But the Admiralty Court in England declined jurisdiction in the case of a bond for repairs and necessaries absolute in its form and without dependence upon the accidents of the voyage, although it contained an express assignment of the ship and freight.[5] It has the power to control extortionate interest in a bottomry bond; but the power is cautiously exercised, as all
the presumptions are in favor of the agreement.[6] It
28 has jurisdiction over a bottomry bond, good in part

[1] The Minerva, 1 Hagg. R. 358.

[2] The Minerva, 1 Hagg. R. 353, 358; The Castilia, ibid, 60; The Eliza, ibid, 182.

[3] 2 Bro. Civ. and Ad. Law, 120; Ewer v. Jones, 2 Ld. Ray. R. 934.

[4] Abbott on Ship. Pt. 2, c. 3, § 28; The Jason, 4 Rob. R. 245.

[5] The Zodiac, 1 Hagg. R. 325; The Atlas, 2 Hagg. R. 48.

[6] The Zodiac, 1 Hagg. R. 325; The Cognac, 2 Hagg. R. 386.

and void in part, to enforce it so far as it is good; for, as is often said, this Court is not governed by the strict rules of the Common Law, but by enlarged principles of equity.[1]

A holder of a bottomry bond is permitted on petition to pay off the wages of the crew of the ship, and to hold the seamen's lien of priority.[2]

In the Court of Admiralty in Ireland it was held that a bottomry bond without express terms of transfer created a lien upon the ship, and that the subject matter, not the form of the contract, gave the security of the ship, and brought the case within the Admiralty jurisdiction.[3]

There does not seem to be any solid distinction between original suits and suits against proceeds.[4] (*a*)

5. In cases of possessory suits, to recover the possession of ships where the property is not in dispute, as where there is a disagreement among part owners relative to the em-

[1] The Augusta, 1 Dod. R. 283; The Tartar, 1 Hagg. R. 169; The Nelson, ibid, 176.

[2] The Kammerhevie Rosenkrantz, 1 Hagg. R. 62.

[3] The Murphy, 2 Bro. Civ. and Ad. Law, 530.

[4] The Maitland, 2 Hagg. R. 255.

(*a*) The question of proceeds is now settled in England in conformity with the principle stated in the text.—The Neptune, 3 Haggard's Ad. R. 129; The Neptune, 3 Knapp's Appeal Cases, 94; The New Eagle, 2 Wm. Robinson's R. 441.

The American cases leave the question in some doubt. Those in Gilpin's R. 184, 536, and 2 Woodbury & Minot's R. 92, incline to allow certain claims to be made against proceeds which could not originally have been enforced in Admiralty.—Gardiner *v.* Ship New Jersey, 1 Peters' Ad. Dec. 223; Brackett *v.* The Hercules, Gilpin's R. 184; Harper *v.* A New Brig, Gilpin's R. 536; Andrews *v.* Wall et al. 3 Howard's S. C. R. 568; Leland *v.* The Medora, 2 Woodbury & Minot's R. 92.

ployment of the ship, or where one part owner unjustly re-
fuses possession of the ship to the master, nominated
29 by the majority; and a proprietary suit will be enter-
tained in case of a claim by British subjects, as the owners of a vessel found in England in the hands of foreigners.[1]

Where the possession of a ship has been obtained by force and violence or manifest fraud, the Admiralty in England will interfere; but in complex cases it declines to interfere, and in questions of title confines its action within narrow limits.[2] After a decree of possession in favor of an owner of a majority of interests, the Admiralty in England declined to grant an attachment to devest possession out of the hands of a wrongful detainer, the circumstances being such that the remedy should be sought elsewhere.[3] A decree of possession has also been refused to an owner of one half part or share of a ship.[4] A copartner or part owner of a ship cannot institute a suit for accounts in the Admiralty in England.[5] A compulsory sale of a ship cannot be de-
creed by the Admiralty in England on the application
30 of the owners of a moiety, or even of a majority, of
the interests in the ship.[6] A bond to a dissentient part owner for the return of the ship is enforced in the Admiralty in England.[7] The bond should be for the return of the ship generally; but where, by the form of it, her return to a

[1] 2 Bro. Civ. and Ad. Law, 113, 114, 397; Sir L. Jenkins' Works, Vol. II. 792; The Agincourt, 1 Hagg. R. 271; The Enchantress, ibid, 395; The Aurora, 3 Rob. R. 136; The Apollo, 1 Hagg. R. 306; The Experimento, 2 Dods. R. 42; Abbott on Ship. Pt. 1. c. 3. [2] The Pitt, 1 Hagg. R. 240.
[3] The John of London, ibid, 342. [4] The Egyptienne, ibid, 346, *note*.
[5] The Apollo, ibid, 313. [6] The Margaret, 2 Hagg. R. 275. [7] Ibid.

particular port was provided, it was not pronounced forfeited, the vessel having been carried in distress into another port and there arrested in suits of salvage and seamen's wages, but remaining safe and unsold; for, when she is within the protection of the country to which she belongs, she is in her general home, and the functions of the Admiralty over this subject have not been mutilated by the restrictions of modern practice.[1] Malicious representations of a dissentient part owner, respecting the character of the ship, deterring passengers and freighters, injurious to the interests of the other owners, furnish an undoubted title to a reparation for the injury, but it is not examinable in the Admiralty in England.[2] In a possession cause, if the molestation be wrongful, damages and costs will be decreed, and if the possession be wrongful, the same decree will be made.[3]

6. In cases of maritime salvage at sea, or within high 31
and low water mark.[1]

7. In cases of collision and injuries to property or persons on the high seas.[2]

In cases of damage by the master and mariners of a ship, the ancient maritime law exacted a full compensation from the owners of the guilty ship, and to this rule England conformed; Holland for the protection of its merchants ordained, that the owners of a ship should not be liable beyond the value of that property of their own which was exposed to

[1] The Margaret, 2 Hagg. R. 275. [2] The Apollo. 1 Hagg. R. 317.
[3] The Pitt, 1 Hagg. R.. 245. [4] Abbott on Ship. Pt. 3, c. 10, § 2, p. 398.
[5] The Thames, 5 Rob. R. 345; The Woodrip Sims, 2 Dods. R. 83; 4 Rob. R. 73; Carey's Case, 2 Bro. Civ. and Ad. Law, 110.

hazard, that is, ship, apparel, and furniture; England followed in successive statutes, by which she fully protected owners of ships beyond those interests.[1]

Since the statutes of Richard II. and Henry IV., it has been strictly held in England, that the Admiralty cannot exercise jurisdiction in civil cases or causes of action arising *infra corpus comitatûs*, and a prohibition within a few years has been issued in a case of collision, happening between
32 the Isle of Wight and the Hampshire coast; and a case of collision in the river Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the Admiralty jurisdiction.[2]

8. In cases of goods and the proceeds of goods piratically taken, which will be arrested by a warrant from the Court, as belonging to the Crown, and as droits of the Admiralty.[3]

By high seas is generally understood where the sea flows in its natural course, and the Admiralty jurisdiction is upon the sea as far as it flows to high water mark, and when it ebbs to low water mark.[4] In Blackstone's Commentaries it is said, "The main or high seas are part of the realm of England, for thereon our Courts of Admiralty have jurisdiction, but they are not subject to the Common Law. This main sea begins at the low water mark; but, between the high water mark and the low water mark, where the sea ebbs and flows, the Common Law and the Admiralty have

[1] The Dundee, 1 Hagg. R. 121; 7 G. II. c. 15; 26 G. III. c. 86; 53 G. III. 159. [2] The Public Opinion, 2 Hagg. R. 398.

[3] The Helen, 1 Hagg. R. 142; The Harvey, 2 Hagg. R. 80.

[4] 5 Rep. 107; Barker et al. *v.* Wharton, 2 Ld. Ray. R. 1452; Hale, De Jure Maris, Harg. Tracts, c. 1, p. 10.

divisum imperium, an alternate jurisdiction; one upon the water when it is full sea, and the other upon land when it is at an ebb."[1] But this is understood of that portion 33 of the sea which washes the open coast, and is not within the body of a county; for Lord Hale says, "The part of the sea which lies not within the body of a county is called the main sea or ocean," and that "branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern from shore to shore, is, or at least may be, within the body of a county."[2] The Admiralty advocates have strenuously contended that ports, creeks, and havens are within the Admiralty jurisdiction, and not within the restraining statutes of Richard. But Dr. Browne expresses his opinion, that they are within those statutes.[3] In a case particularly of torts, it is said, that coasts, shores, and harbours are out of the power of the Admiral.[4] It should here be observed, that these cases, in which the jurisdiction of the Admiralty has been excluded, where the torts were committed upon water within the body of a county, were decided since the restraining statutes of Richard II. and Henry IV., and in reference thereto.[5]

The ancient commissions of the Lord High Admiral 34 confer the most ample maritime jurisdiction. They authorize the Admiralty "to hold conusance of pleas, debts, bills of exchange, policies of assurance, accounts, charter-parties, contractions, bills of lading, and all other contracts

[1] 1 Black. Comm. 110. [2] De Jure Maris, Harg. Tracts, c. 4, p. 10.

[3] 2 Bro. Civ. and Ad. Law, 92.

[4] Hawkeridge's Case, 12 Rep. 129; Moore R. 892; 3 T. R. 315; Cro. Jac. 514; 2 Bro. Civ. and Ad. Law, 111.

[5] 2 Henry IV. c. 11; The Public Opinion, 2 Hagg. Rep. 398.

which may any ways concern moneys due for freight of ships hired and let to hire, moneys lent to be paid beyond the seas at the hazard of the lender, and also of any cause, business, or injury whatsoever, had or done in or upon or through the seas or public rivers or fresh waters, streams, havens, and places subject to overflowing whatsoever, within the flowing and ebbing of the sea upon the shores or banks whatsoever adjoining to them or either of them, from any of the said first bridges whatsoever towards the sea, throughout our kingdoms of England and Ireland in our dominions aforesaid, or elsewhere beyond the seas, or in any ports beyond the seas whatsoever."[1]

In Scotland, the Admiralty has cognizance of "all complaints, contracts, offences, pleas, exchanges, assecurations, debts, counts, charter-parties, covenants, and all other writings concerning lading and unlading of ships, freights,
35 hires, money lent upon casualties and hazard at sea, and all other businesses whatsoever among sea-farers done at sea, this side sea or beyond sea; the cognition of writs of appeal from other judges, and the causes and actions of reprisal and letters of mark; and to take stipulations, cognoscions, and insinuations in the books of the Admiralty."[2]

In Scotland, the Judge of the Admiralty is "the King's justice-general upon the seas or fresh water within flood and mark, and in all harbours and creeks,"[3] and he "hath power within the sea-flood over all sea-faring men, and in all sea-faring causes and debates, civil and criminal."[4]

The Admiralty Courts in the British provinces in North

[1] De Lovio *v.* Boit, 2 Gall. R. 452, *note.* [2] Ibid, 468, *note.*
[3] 2 Bro. Civ. and Ad. Law, 30. [4] Zouch. 91.

America, before the American revolution, possessed very extensive Admiralty jurisdiction. The commission to the Governor of New Hampshire, investing him with the power of an Admiralty Judge, authorized him "to take cognizance of, and proceed in, all causes, civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, accounts, charter-parties, agreements, suits, trespasses, extortions, and demands, and business, civil and maritime whatsoever, commenced or to be com- 36
menced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever, with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our Vice-Admiralty of our said province, &c., or between any other persons whomsoever had, made, begun, or contracted, for any matter, thing, cause, or business whatsoever done or to be done within our maritime jurisdiction aforesaid, &c. &c.; and moreover in all and singular complaints, contracts, agreements, causes, and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers. And it declares the jurisdiction to extend "throughout all and every the sea-shōres, public streams, ports, fresh waters, rivers, creeks, and arms as well of the sea, as of the rivers and coasts whatsoever, of our said provinces," &c.[1]

The Vice-Admiralty Court in Massachusetts exercised a jurisdiction far more extensive than that of the Admiralty in England.[2]

[1] De Lovio *v.* Boit, 2 Gall. R. 470, *note.* [2] Ibid, 471, *note.*

In Virginia it was provided, by laws passed in 1659
37 and 1660, that the Governor and Council should "have full power and authority of a Court of Admiralty to cognoss, determine, and administer justice in all things pertaining to sea-fairing, that shall appertaine, happen, or fall out within the jurisdiction of this collonie, either between mariner and merchant, or mariner and master, as likewise all complaints, contracts, offences, pleas, exchanges, assecurations, debts, counts, charter-parties, covenants, and all other writings concerning lading and unlading of shipps, freights, hyres, and all other business among sea affairs done on the water and when within the limits of the jurisdiction of Virginia, or the laws and cognizance thereof, with the cognition of writs, the causes and actions of reprisals, of letters of marque, to take stipulations, cognitions, and instructions."[1]

The patent of the Judge of the British Vice-Admiralty Court at the Cape of Good Hope, empowers him to take cognizance of charter-parties, and the exercise of jurisdiction over this subject by that Court is sustained in the High Court of Admiralty.[2]

The Constitution of the United States delegates to the
38 Judiciary of the United States cognizance "of all cases of Admiralty and maritime jurisdiction."[3] By this, a learned commentator on the Constitution of the United States understands, that, in all cases, where the Admiralty jurisdiction was, in the jurisprudence of the existing system of laws in our country, exclusive, as in prize cases, an exclusive jurisdiction was given; and that, in other maritime cases,

[1] The Schooner Tilton, 5 Mason's R. 472, *note*.
[2] The Elizabeth, 1 Hagg. R. 226. [3] Const. U. S., art. 3, § 2.

where the Common Law Courts exercised concurrent jurisdiction, a concurrent jurisdiction was granted to the Admiralty Courts of the United States, which might be established pursuant to the Constitution.[1] (*a*)

By the Judicial Act of Congress, District Courts were established; and it is provided, that they shall have "exclusive original cognizance of all civil cases of Admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; saving to suitors in all cases the right of a Common Law remedy, where the Common Law is competent to give it; and shall also have exclusive original cognizance of all seizures on 39
land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of

[1] 3 Story's Comm. on Const. 533, § 1666, *note*.

(*a*) The meaning of the saving clause in the ninth section of the Judiciary act, is that in cases of concurrent jurisdiction in Admiralty, and at Common Law, the jurisdiction in the latter is not taken away.—Waring *v.* Clarke, 5 Howard, 441.

In 2 Sumner, 589, it is said that a suit in a State Court by replevin, or by an attachment of the property in question, cannot supersede the right of a Court of Admiralty to proceed by a suit *in rem*, to enforce a right or lien against that property. To this opinion Judge Grier adds a qualification, "that the pendency of a replevin in a State Court to settle the right of property in a vessel, is a bar to a libel in Admiralty to settle the *same* right between the *same* persons; not technically a bar as a plea of *lis pendens*, but effectively so to prevent a conflict of jurisdiction."—Taylor *v.* Royal Saxon, Wallace Jr.'s R. 311.

Where there is concurrent jurisdiction, the mode of trial is that of the Court where the suit is being tried.—Davis *v.* A New Brig, Gilpin's R. 482.

United States." And "the trial of all issues of fact in District Courts in all cases, except civil causes of Admi-
nd maritime jurisdiction, shall be by jury."[1] It has
oposed, that the provision, giving Admiralty jurisdic-
seizures, for violations of impost, navigation, and
ade laws on waters navigable from the sea by vessels of ten or more tons burthen, extended generally the Admiralty jurisdiction "in civil causes" over such waters. But the Supreme Court of the United States has decided, that this "is a statutable provision, and limited to the cases there stated."[2] But it would seem that waters, navigable from the sea by vessels of ten or more tons burthen within the respective Districts, are places within the Admiralty and maritime jurisdiction of the United States over "civil causes," according to the provisions of the Constitution, vesting, without limitation, in the Judiciary of the United States, cognizance "of
all cases of Admiralty and maritime jurisdiction;" or
40 else the Act of Congress which includes, within the Ad-
miralty and maritime jurisdiction, seizures under the laws of impost, navigation, or trade of the United States on waters navigable from the sea, by vessels of ten or more tons burthen within the respective Districts, as "civil causes" of Admiralty and maritime jurisdiction, would seem to be unconstitutional; for Congress has no authority to include cases within the Admiralty and maritime jurisdiction of the United States, which are not so in fact and warranted by the Constitution of the United States.[3] If, therefore, this Act of

[1] Act of Cong. 1789, c. 20. § 9.
[2] The Thomas Jefferson, 10 Wheat. R. 428.
[3] De Lovio v. Boit, 2 Gall. R. 474.

Congress be constitutional, it would appear to be a declaratory act, asserting that the Admiralty and maritime jurisdiction of the United States in "civil causes" over all waters within the respective districts, navigable from the sea by vessels of ten or more tons burthen, as well as upon the high seas, and consequently all "civil causes" there arising founded on torts, are by the Constitution within the Admiralty and maritime jurisdiction, as well as the seizures mentioned in the Act of Congress.

Perhaps the true construction of the Act of Congress upon this subject may be, that seizures on waters navigable from the sea by vessels of ten or more tons 41 burthen, in order to be brought within the Admiralty jurisdiction, must be made on waters, so navigable so far as the influence of the tide occasions a regular rise and fall of the water, and no further; for it can hardly be supposed that the Admiralty jurisdiction can extend in any case thousand of miles into the interior of the country over rivers navigable by vessels of ten or more tons burthen. The fact of the influence of the tide upon the waters has been held by the Supreme Court of the United States to be the decisive test, which determines the Admiralty jurisdiction in all cases where it depends upon locality.[1] (*a*) This construction will remove all Constitutional difficulties in relation to this Act of Congress and the Admiralty jurisdiction

[1] Peyroux et al. *v.* Howard et al., 7 Pet. Sup. Ct. R. 343.

(*a*) The Steamboat Orleans *v.* Phœbus, 11 Peters' R. 175; The United States *v.* Lawrence Coombs, 12 ibid 72; Waring *v.* Clarke, 5 Howard's S. C. R. 441; Thomas *v.* Lane, 2 Sumner's R. 1.; Thackeray *v.* The Farmer, Gilpin's, R. 524; The Robert Morris, Wallace Jr.'s R. 33.

in the case of a seizure, which, in a case of forfeiture, would be confined within the same boundaries that define it in all other cases of torts. (*a*)

Since the establishment of the Judicial tribunals of the United States, under the Constitution, there have been many important decisions upon the subject of the jurisdiction of the Admiralty. The terms *Admiralty* and *maritime jurisdiction*, (*b*) according to etymology and received use,

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(*a*) Act of Congress, Feb. 26, 1845, Chap. 20:

"AN ACT extending the jurisdiction of the District Courts to certain cases, upon the lakes and navigable waters connecting the same.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said Courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the Admiralty and maritime jurisdiction of the United States; and in all suits brought in such Courts in all such matters of contract or tort, the remedies, and the forms of process, and the modes of proceeding shall be the same as are or may be used by such Courts in cases of Admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of Admiralty and maritime jurisdiction; saving, however, to the parties, the right of trial by jury of all facts put in issue in such suits, where either party shall require it; and saving also to the parties, the right of a concurrent remedy at the Common Law, where it is competent to give it, and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation."

(*b*) In the grant in the Constitution, of "Admiralty and maritime jurisdic-

42 extend to all things done upon, and relating to the sea, to transactions relating to commerce and navigation, and to damages and injuries upon the sea.[1] Cases of maritime jurisdiction include all maritime contracts, torts, and injuries, which are, in the understanding of the Common Law, as well as of the Admiralty, *causæ civiles et maritimæ*.[2] In reference to contracts, the Admiralty jurisdiction is not limited with respect to place. It depends upon the nature of the cause; and the statutes of Richard II. have received a construction in the English Courts which prevents their extension to the United States.[3] There are decisions of the Courts of the United States which establish that the statutes of Richard, and the construction of these statutes by the English Common Law Courts, do not attach to the clause of the Constitution giving Admiralty jurisdiction to the tribunals of the United States.[4](*a*) Sei-

[1] De Lovio *v.* Boit, 2 Gall. R. 468. [2] Ibid, 471.
[3] The Sandwich, 1 Peters' Ad. R. 233, *note*.
[4] De Lovio *v.* Boit, 2 Gall. R. 473.

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tion," it is to be presumed that these words are used in the sense which they had in this country at the time when the Constitution was adopted. The jurisdiction of the Admiralty Court in this country at the time of the Revolution, and for a century before, was more extensive than that of the High Court of Admiralty in England. The terms Admiralty and Maritime belong to the law of nations, as well as to our own domestic law, especially "Admiralty." A Court of Admiralty is a Court of the law of nations, and derives in part its jurisdiction from that law. The Constitution may therefore refer to the law of nations for the meaning of these terms, as constituting part of our own law.—See a valuable note in Daveis R. 93.

(*a*) Waring *v.* Clarke, 5 Howard S. C. R. 441; The New-Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 Howard, 386; Steele *v.* Thatcher, Ware R. 91.

zures, under laws of impost, navigation, and trade, on waters navigable from the sea by vessels of ten or more tons burthen, as well within ports and Districts within the United States, as upon the high seas, are causes of Ad- 43 miralty and maritime jurisdiction.[1]

The delegation of the cognizance of "all civil cases of Admiralty and maritime jurisdiction" to the Courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts wheresoever they may be made or executed, or whatever may be the form of the stipulations which relate to the navigation, business, or commerce of the sea.[2] (*a*) All "civilians and

[1] The La Vengeance, 3 Dall. R. 297; The Sally, 2 Cranch R. 406; The Betsey, 4 Cranch R. 443. [2] De Lovio *v.* Boit, 2 Gall. R. 474.

(*a*) A tort committed on tide-waters within foreign ports is within Admiralty jurisdiction.—Thomas *v.* Lane, 2 Sumner R. 1.

Courts of Admiralty have full jurisdiction as incidental to cases of prize, salvage, and other proceedings *in rem*, to decree freight to the shipowner in proper cases.—Ship Nathaniel Hooper, 3 Sumner R. 542.

Suits *in rem* are local; and the Court within whose jurisdiction the thing is situated is the proper forum, though all the parties in interest are foreigners.—The Bee, Ware R. 332; The Jerusalem, 2 Gall. R. 191; Clarke *v.* New-Jersey Steam Nav. Co., 1 Story R. 531; The Ada, Daveis R. 407.

Whether a libel lies on a mere mortgage of a vessel as a chattel, to secure a debt arising out of a maritime contract, is doubtful here, and is sustained in England only under an express statute.—Leland *v.* The Medora, 2 Woodbury & Minot R. 108.

An agreement of consortship between the masters of two vessels engaged in wrecking may be enforced in Admiralty against property or proceeds in the custody of the Court.—Andrews *v.* Wall, 3 Howard R. 568.

Policies of Insurance are within Admiralty jurisdiction.—De Lovio *v.* Boit, 2 Gall. R. 398; Hale *v.* The Washington Ins. Co., 2 Story R. 176.

jurists agree, that, in the appellation of maritime contracts, are included, among other things, charter-parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships, contracts between part owners of ships, contracts and *quasi* contracts respecting averages, contributions, and jettisons."[1] (*a*)

Courts of Admiralty have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts, as a contract to build
44 a ship, sign a shipping paper, or execute a bottomry bond; but if the contract be an executed maritime contract, the jurisdiction attaches; for the law looks to the proximate, and not to the remote cause, as the source of jurisdiction, and the Admiralty Court assumes jurisdiction only when the contract takes its final shape as a maritime contract.[2] (*b*)

[1] De Lovio *v.* Boit, 2 Gall. R. 475.

[2] Andrews et al. *v.* Ess. F. & M. Ins. Co., 3 Mason R. 16.

It is held in the United States District Court for the Southern District of New York, that Admiralty has jurisdiction over contracts for the transportation of passengers.—Marshall *v.* Bazin, 7 New-York Legal Obs. 344; The Zenobia, 10 vol. MSS. Decisions of Judge Betts, page 51; The Ship Aberfoyle, 12 vol. MSS. Dec., 35.

(*a*) The Volunteer, 1 Summer R. 551; The Reeside, 2 ibid, 567; Certain Logs of Mahogany, ibid, 589; The Tribune, 3 ibid, 144; The Nathaniel Hooper, ibid, 542; Arthur *v.* Schooner Cassius, 2 Story R. 81; Drinkwater *v.* The Spartan, Ware R. 149; The Rebecca, ibid, 189; The Phebe, ibid, 263; The Paragon, ibid, 322; The Huntress, Daveis R. 83; The Brig Casco, ibid, 184.

(*b*) The Crusader, Ware R. 437.

An agreement for a charter-party to be made at a later period was held, under the circumstances, to amount to a present charter-party, notwithstanding a more formal instrument was contemplated.—The Tribune, 3 Sumner R. 144.

The Admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested. It embraces also maritime contracts, torts, and offences, in which the principles of the law and comity of nations often form an essential inquiry.[1] The wisdom of the delegation of Admiralty jurisdiction to the tribunals of the United States has never been questioned, because so many of the questions arising in Admiralty Courts depend upon the Law of Nations, and affect the rights and interests of foreigners.[2] Questions of prize are exclusively of Admiralty jurisdiction; and before adjudication an action will not lie at Common Law to recover the property taken as 45
prize from the person in whose possession it is; and the Admiralty will take cognizance of the distribution of proceeds, and all the incidents to a prize cause.[3] A decree *in rem* is conclusive upon all the world.[4] If a case appear to be a water transaction, as a case of exportation in violation of law, it is a case of Admiralty jurisdiction.[5] So in the case of a seizure of a vessel employed in the slave-trade in violation of the laws of the United States, the cause is of Admiralty jurisdiction.[6] A seizure of a vessel and her cargo, part on board and part landed, for a violation of the non-importation laws, is triable in the Admiralty,—

[1] Martin *v.* Hunter's lessee, 1 Wheat. R. 335.

[2] The Federalist, No. 80; Chisholm *v.* Georgia, 2 Dall. R. 475.

[3] Bingham *v.* Cabot et al., 3 Dall. R. 40, 41; The Gloucester, 2 Dall. R. 37; The St. Lawrence, 2 Gall. R. 19.

[4] Penhallow *v.* Doane, 3 Dall. R. 86; Williams *v.* Armroyd, 7 Cranch R. 423, 432.

[5] The La Vengeance, 3 Dall. R. 297. [6] The Sally, 2 Cranch R. 406.

the illegal importation being a water transaction, and the landing of a part of the cargo not excluding the Admiralty jurisdiction; for the rule is clear, if the original cause arise at sea, and other matters happen on land depending thereon, the Admiralty retains its jurisdiction over the subject;

and, if the forfeiture arise at sea, the bringing the
46 things forfeited to land will not oust the Admiralty of its jurisdiction.[1] All seizures under the laws of impost, navigation, and trade of the United States, made on waters navigable from the sea by vessels of ten or more tons burthen, are civil causes of Admiralty and maritime jurisdiction, and triable without a jury.[2] The place of seizure determines the jurisdiction of the Court which is to try the offence.[3] (*a*) The Admiralty may proceed for a forfeiture, by our laws, on a seizure made on waters within the territory of a foreign power, and the cause is to be tried in the District into which the property is taken, and in which the prosecution is instituted.[4] Where the seizure is made on the high seas, jurisdiction is given to no particular District, and may be exercised by the Court of any District into which the property is carried, and there proceeded

[1] Clark *v.* U. States, 2 Wash. C. C. R. 519; The Samuel, 1 Wheat. R. 9; The Fanny, 2 Pet. Ad. R. 324.

[2] The Betsey & Charlotte, 4 Cranch, 443; Whelan *v.* United States, 7 Cranch R. 112.

[3] The Betsey, 4 Cranch R. 452; Keene *v.* United States, 5 Cranch R. 304; The Ship Octavia, 1 Gall. R. 488; The Brig Ann, 9 Cranch R. 291; The Little Anne, 1 Paine R. 40.

[4] The Richmond, 9 Cranch R. 102; The Merino, 9 Wheat. R. 402.

(*a*) The United States *v.* Fourteen Packages, Gilpin R. 237.

against.[1] The decrees of the Admiralty Courts of the 47
United States are final and conclusive on the question, whether the seizure be lawful or not, and no State Court can interfere with the property, or prevent the exercise of this exclusive jurisdiction.[2] A party making a seizure, triable in the Admiralty, may be required to proceed to adjudication, or abandon the seizure; and, in case of neglect, the injured party may libel for damages.[3] When a seizure is explicitly and fairly abandoned, the right founded on it is gone, and can be revived only by a new seizure, which may be lawfully made.[4] The property libelled should be actually or constructively within the reach of the process of the Court.[5]

A Court of Admiralty of one country can carry into effect the determination of a Court of Admiralty in another, as well as its own judgments.[6]

In the Admiralty Court in England, an opinion has been expressed by Lord Stowell, that a sale of a wrecked 48
vessel, made *optimâ fide*, and under the pressure of necessity, by the master without the authority of his owners in a foreign country, where there is no correspondent of the owners, and where no money can be obtained upon hypothecation to defray the expenses of repairs, would be sustained in the Admiralty. The practice in the British Vice-Admiralty

[1] The Merino, 9 Wheat. R. 402.

[2] Slacum *v.* Maberry, 2 Wheat. R. 9; Gelston *v.* Hoyt, 3 Wheat. R. 312.

[3] Slacum *v.* Maberry, 2 Wheat. R. 10.

[4] The Ann, 9 Cranch R. 291; The Woodbridge, 1 Hagg. R. 74.

[5] The Ann, 9 Cranch R. 291.

[6] 6 Viner's Abr.; Court of Admiralty, B. 12, p. 513; 1 Lev. R. 267; 1 Vent. 32; Godb. R. 260; The Gloucester, 2 Dall. R. 37; Penhallow *v.* Doane, 3 Dall. R. 97.

Courts in the West Indies, of ordering a sale under the supervision of the Court, upon the fact of distress being proved, was considered by that Judge to be convenient; and he said the Court would strain hard to support the title of the purchaser, where no suspicious circumstances appeared in the transaction.[1] (*a*) But the Courts of Common Law in England do not consider such sales binding, and deny the authority of the Courts of Admiralty by the Law of Nations to decree them, and they deny that the Admiralty Court in England exercises such a power.[2]

But it is considered in the United States as incident to the Admiralty power to decree the sale of a wrecked
49 vessel; and a clear opinion has been expressed by the Admiralty Courts, that Congress may regulate this subject, as appertaining to the Admiralty jurisdiction.[3]

In cases of maritime torts, the Admiralty Courts of the United States have so constantly exercised jurisdiction, that the right is now deemed unquestionable.[4] A suit is sustainable in the Admiralty, not only for direct injuries, but also for consequential damage; and it has been maintained

[1] The Fanny & Elmira, Edw. R. 117; Att'y. Gen. *v.* Norstedt, 3 Price R. 97.

[2] Reid *v.* Darby, 10 East R. 143; Morris *v.* Robinson, 3 Barn. & Cressw. R. 196; 3 Kent's Comm. 95, (131, 2d Ed.)

[3] Jenny *v.* Col. Ins. Co. 10 Wheat. R. 418; The Tilton, 5 Mason R. 474; Peisch *v.* Ware, 4 Cranch R. 347.

[4] Manro *v.* Almeida, 10 Wheat. R. 488; Maley *v.* Shattuck, 3 Cranch R. 458; The Charming Betsey, 2 Cranch R. 64; The Apollon, 9 Wheat. R. 362; Am. Jurist, Vol. VII., p. 70, Butler's Case.

(*a*) The Sarah Ann, 2 Sumner R. 206; Robinson *v.* Commonwealth Ins. Co., 3 Sumner R. 220.

against a master of a vessel for immodest and harsh deportment and improper language towards passengers, in disregard of his duties in relation to them.[1] The Admiralty has jurisdiction of a suit by owners of a vessel against the master for damages sustained by them in consequence of a wrongful capture made by him.[2] If a fault of the master, respecting the cargo, be committed *super altum mare*, the Admiralty will have jurisdiction, and may claim it 50
in a place where there is *divisum imperium* according to the flux and reflux of the tide.[3] If property be taken at sea and brought to land, a suit for it is maintainable in the Admiralty.[4] A father may sue in the Admiralty for the tortious abduction or seduction of his minor son.[5] (*a*) The Admiralty has jurisdiction in cases of mere marine trespass, where either the person or effects of the offending party, or debts due to him, are within the reach of the process of the Court.[6] But the Admiralty Courts of the United States

[1] Chamberlain *v.* Chandler, 3 Mason R. 242.

[2] Dean et al. *v.* Angus, Bee. Ad. R. 369; Purviance *v.* Angus, 1 Dall. R. 184.

[3] 2 Pet. Ad. R. Appendix, 74; 2 Bro. Civ. and Ad. Law, 144.

[4] 1 Roll. Ab. 533, § 18; 2 Wash. C. C. R. 519.

[5] Plummer *v.* Webb, 4 Mason R. 380.

[6] The Invincible, 2 Gall. R. 41; The Amiable Nancy, 1 Paine R. 111.

(*a*) Sherwood *v.* Hall, 3 Sumner R. 128; Steele *v.* Thatcher, Ware R. 91; Luscom *v.* Osgood, 7 Law Rep. 132.

A libel may be maintained in the Admiralty by a father for the consequential damages resulting from an assault and battery of his minor child, on the high seas. But to support the action, he must show either actual damage, or what is held to be such by intendment of law; and the action may be maintained after the death of the child, although the death was occasioned by the severity of the battery.—Plummer *v.* Webb, Ware R. 75.

have no jurisdiction over a claim for damages for a capture as prize by a commissioned cruiser of a belligerent, although the vessel captured may belong to citizens of the United States, and the capturing vessel or her commander may be within the reach of the process of the Court; the captured vessel having been carried *infra præsidia* of the captors.[1]

When captures are made in violation of our neutrality,
51 the Admiralty Courts of the United States have jurisdiction, and will interpose to restore the property, with costs and expenses, found within the reach of their process.[2] A public vessel of war, belonging to a foreign friendly state, entering a port of the United States, and conducting herself in a friendly manner, is exempt from the jurisdiction of our courts; but the Government may destroy the exemption, and claim and exercise jurisdiction over her, either by force, or by subjecting her to the ordinary tribunals.[3]

Cases of collision of vessels on the high seas are frequently tried in the Admiralty, and suits have been sustained in the District Court of the United States for the District of Massachusetts, when the damage happened in the harbour of Boston, and to vessels lying at the wharves.[4] (*a*) It will decree restitution of a vessel in a case of wrongful capture by cruisers of the United States, and

[1] United States *v.* Peters, 3 Dall. R. 121; The Alerta, 9 Cranch R. 364; The La Amistad de Rues, 5 Wheat. R. 390.

[2] Talbot *v.* Jansen, 3 Dall. R. 133; The Betsey, ibid, 288, *note;* The Alerta, 9 Cranch R. 359. [3] The Exchange, 7 Cranch R. 135.

[4] Sancry's Case, U. S. District Court, Mass., March T. 1832.

(*a*) Livingston v. The Express, 6 New-York Legal Observer, 401.

damages when there has been embezzlement and ill usage against the captors.[1] The Admiralty, by the Constitution and laws of the United States, has jurisdiction in 52
prize cases to as ample an extent as the Admiralty in England, and takes cognizance of all captures made at sea, in creeks, harbours, and rivers, and of captures on land by a naval force, or by the co-operation of land with naval forces.[2] When there has been a damage to goods shipped by the insufficiency of the ship or neglect of the master, the Admiralty will enforce the maritime lien on the ship for compensation.[3] In England, this principle of the marine law cannot be carried into effect, because the Court of Admiralty, where alone proceedings can be effectually carried on against the ship to enforce the lien, is considered not to have jurisdiction of the case.[4] In the trial of Thomas Green, commander of the ship Worcester, for piracy, before the High Court of Admiralty, a Procuratory and Protest were filed by the Court of Directors of the Company of Scotland, trading to Africa and the Indies, alleging that the said ship Worcester and her cargo were by sentence of the High Court of Admiralty found liable, by way of reprisal, to the said Company, for reparation of the dama- 53
ges sustained by them from the wrongful seizure of their ship, the Annandale, by the commander and crew of the Worcester.[5] A suit for damages has been maintained in the Admiralty, in Massachusetts, for a fraudulent ship-

[1] The Lively, 1 Gall. R. 315. [2] The Emulous, ibid, 573, 575.
[3] The Rebecca, Am. Jurist, Vol. VI, p. 6.
[4] Abbott on Ship., Pt. 2, c. 2, §5, p. 94; 3 Kent's Comm. 124, (218, 2d ed.)
[5] 5 State Trials, 609.

ment of seamen for a fictitious voyage, the Court considering the defendant estopped to deny the reality of the voyage, and awarding damages in the shape of wages.[1] Damages are recoverable in the Admiralty by seamen shipped, in consequence of the breaking up of the voyage.[2] In cases of wrongful dismission of seamen before the end of the voyage, the Court usually awards damages in the shape of wages.[3] A suit has been sustained in the Admiralty, in Massachusetts, by a foreigner, brought tortiously from his own country to the United States, against the master of the vessel in which he was brought. An action lies in the Admiralty against the master for a wrongful dismissal of his mate from his station.[4]

54 If the master of a vessel borrow money abroad for the necessary repairs of the vessel, the Admiralty has jurisdiction.[5] By the general maritime law, every contract of the master for repairs and supplies, imports an hypothecation of the ship; and, in case of a foreign ship, or a ship belonging to another state, a lien on the ship is created.[6] (*a*) With respect to repairs and supplies to a ship, in a state to which it be-

[1] Stewart's Case, U. S. District Court, Mass.

[2] Abbott on Ship., Pt. 4, c. 4, p. 476.

[3] The Gloucester, 2 Pet. Ad. R. 403; The Oder, ibid, 261; Hart's Case, 1 Pet. Ad. R. 119, 120; Relf's Case, ibid, 193; Johnstone *v.* Sutton, 1 T. R. 526. [4] Paty's Case, U. S. District Court, Mass.

[5] The Rainbow, Bee. Ad. R. 116; The Charles Carter, 4 Cranch R. 332.

[6] The Jerusalem, 2 Gall. R. 349; The Sandwich, 1 Pet. Ad. R. 233, *note;* The Eagle, Bee. Ad. R. 78; The Aurora, 1 Wheat. R. 105; The Gen. Smith, 4 Wheat. R. 438.

(*a*) Exclusive credit given to the master, is a waiver of the material-man's lien.—The Nestor, 1 Sumner R. 73.

longs, no general maritime lien exists in the United States, and the case is regulated by the local law; and where by that law a lien is created, it will be enforced in the Admiralty.[1] (a)

Every contest and dispute between the owners and mariners, and the owners and builders and equippers of a ship, as such, for navigation on the seas, is of a maritime nature and cognizable in the Admiralty; also all matters which concern owners and proprietors of ships as such, all cau- 55
ses of pawning, hypothecations, or pledging the ship or any part thereof at sea, and whatever is of a maritime nature, and all causes of outriggers, furnishers, owners, and part owners of ships.[2] (b)

[1] The Gen. Smith, 4 Wheat. R. 438; The Hannah, Bee. Ad. R. 419; The Levi Dearborn, 4 Hall's Law J. 97; Lewis's Case, 2 Gall. R. 483; The Two Friends, Bee. Ad. R. 433; The Robert Fulton, 1 Paine R. 626; The President, 4 Wash. C. C. R. 453; Peyroux v. Howard, 7 Pet. Sup. Ct. R. 341.

[2] The Sandwich, 1 Pet. Ad. R. 233, *note.*

A lien exists on the vessel for repairs made, and supplies furnished, when she is a foreign vessel. But it is doubtful whether this lien is to be considered as relied on, if the vessel is allowed to sail without its being enforced, and in case of a foreign vessel, where no express hypothecation of her is taken from the master, and where the person making such repairs and advances is the consignee of the owners, and takes for his debt a bill of exchange by the master on the owners, allowing sixty days credit. Under these circumstances, if he permits the vessel to depart, and to make a second voyage before attempting to enforce the lien on the vessel, and refrains for one month after the bill is due to collect it of the owners then in good credit, it is decisive evidence that the lien has been waived if it once existed, and he is not then permitted to sustain the lien on the vessel, though offering to return the bill of exchange.—2 Woodbury & Minot, 92; See The Nestor, 1 Sumner, 73; The Chusan, 2 Story, 456.

(a) Read v. The Hull of a New Brig, 1 Story R. 244.

(b) A valid contract of hypothecation may be made, not only of things

The case of material-men *in rem*, where a lien exists, and *in personam* in all cases, is within the undisputed jurisdiction of the Admiralty.[1] (*a*) The Admiralty has jurisdiction to enforce against the ship the lien of a shipwright, having the ship still in his custody.[2] (*b*) It has jurisdiction of the claim of a shipwright for services on a vessel in New Orleans; for the service is maritime, and the influence of the tide is felt there, causing a regular rise and fall of the water, which determines the question even when the Admiralty jurisdiction depends upon locality.[3] The Admiralty will en-

[1] The President, 4 Wash. C. C. R. 453; The Gen. Smith, 4 Wheat. R. 443; The Jerusalem, 2 Gall. R. 345.

[2] The Lady Horatia, Bee. Ad. R. 168.

[3] Peyroux et al. *v.* Howard et al., 7 Pet. Sup. Ct. R. 324.

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which the party has, at the time of making the contract, but of what he expects to have, and of things not then in existence. It will attach to and bind the party's interest in the thing as soon as it comes into being.

The hypothecation creditor is not subrogated to the privilege of mechanics and material-men, merely by paying their claims on orders drawn by the builder. But when he actually furnished materials he was allowed to claim concurrently with them.—The Hull of a New Ship, Daveis R. 199.

(*a*) Davis *v.* A New Brig, Gilp. R. 473; Harper *v.* A New Brig, ibid, 536.

The lien of material-men upon the vessel must be enforced within a reasonable time after the debt is due, or it will not avail against a bona-fide purchaser without notice.—The Barque Chusan, 2 Story R. 456.

A person who lends money to be employed in the repairs of a vessel, or to furnish her with supplies, has the same privilege against the vessel that material-men have.—Davis *v.* Child, Daveis R. 71.

The lien of material-men attaches also to the freight as well as the ship.—Drinkwater *v.* The Freight and Cargo of the Spartan, Ware R. 149.

In the Jerusalem, 2 Gall. R. 345, it was held that the lien of a material-man is preferred to a bottomry bond which is prior in point of time, if the repairs are indispensable.

(*b*) The Schooner Marion, 1 Story R. 68.

force the lien created by bottomry bonds and by legal hypothecations of freight and cargo by a process *in rem*.[1] (*a*)
It is not settled, in the Admiralty Courts of the United 56
States, whether the Admiralty jurisdiction extends to the case of a bottomry bond in which there is no transfer or mortgage of the ship. In the District Court of the United States for the District of Maryland, the jurisdiction has been sustained upon the ground that an immediate pledge of the ship was implied by the contract.[2] It has however been held, that a bottomry or hypothecation bond, without an express transfer or mortgage given by the owner in the place wherein he resides, does not bind the ship, and is cognizable only in a Common Law tribunal.[3] (*b*) The Admiralty will sustain a bottomry bond partly good and partly void, so far as it is good; for it is not governed by the strict rules of the Common Law, but by enlarged principles of Equity, and it is a Court of Equity.[4] (*c*) The Admiralty will moderate

[1] The Aurora, 1 Wheat. R. 102; The Packet, 3 Mason R. 255; Ibid, 264; The Mary, 1 Paine R. 671; The Active, 2 Wash. C. C. R. 226; The Smilax, 2 Pet. Ad. R. 295, *note*. [2] The Smilax, 2 Pet. Ad. R. 295, *note*.

[3] Watkinson *v.* Barnardiston, 2 P. Will. 367; The Two Friends, Bee. Ad. R. 410; The John & Alice, 1 Wash. C. C. R. 293; 2 Wash. C. C. R. 145; The Charles Carter, 4 Cranch R. 328.

[4] The Virgin, 8 Pet. Sup. Ct. R. 538; The Minerva, 1 Hagg. R. 357.

(*a*) The Draco, 2 Sumner R. 157.

(*b*) The Admiralty jurisdiction was sustained over a bottomry bond, made by the owner in a home port.—The Draco, 2 Sumner R. 157, 174, 178.

Where a bond provides for no marine interest or marine risk, and merely pledges the vessel to secure a debt and simple interest, it is not within Admiralty jurisdiction as a bottomry bond.—See Leland *v.* the Medora, 2 Woodbury & Minot R. 107, 108, and cases there cited.

(*c*) The Hunter, Ware R. 249; The Prince George, 4 Moore R. 21; The Heart of Oak, 1 Wm. Robinson R. 204.

the marine interest when excessive.[1] It will reform the contract in case of a mistake.[2]

57 Cases of general average are legitimate subjects of Admiralty jurisdiction, being cases of implied contracts, arising out of the marine contract of shipment. The master has a lien upon the goods saved, to enforce the payment of the lawful contribution for the loss sustained. This is the maritime law of Europe and of the United States.[3](*a*) The Admiralty Courts are the proper tribunals to enforce this lien and to adjust speedily the contribution.

Cases of maritime salvage constitute an important branch of Admiralty jurisdiction in the United States, both when the property is saved on the ocean, and when wrecked upon shoals and rocks upon the coast.[4] (*b*) It is suggested by a learned Admiralty Judge, that a process *in personam* may be maintained in the Admiralty for marine salvage.[5] The

[1] The Packet, 3 Mason R. 255. [2] The Zephyr, ibid, 343.

[3] Strong *v.* New-York Firemen's Ins. Co. 11 Johns. R. 323; 3 Kent's Comm. 196, (244, 2d Ed.); Ramsay *v.* Allegre, 12 Wheat. R. 615.

[4] The Mary Ford, 3 Dall. R. 188; Brig ———, 1 Mason R. 372; The Emulous, 6 Mason R.; The Bolina, 1 Gall. R. 82; The Favorite, 4 Cranch R. 347; The Fair American, 1 Pet. Ad. R. 94; Am. Ins. Co. *v.* Canter, 1 Pet. Sup. Ct. R. 513. [5] The Bolina, 1 Gall. R. 82.

(*a*) The Supreme Court of the United States have recently decided that cases of general average, *after the possession has been parted with*, are not the subject of Admiralty jurisdiction. The maritime law, in cases of general average, gives only a right of retainer, and not an absolute lien.—Cutler *v.* Rae, 7 Howard's S. C. R. 732.

(*b*) The Boston, 1 Sumner R. 328, 341.

Salvors have only rights *in rem*, not *in personam*, if they abandon their possession. But if the property is delivered by the salvors to the owners be-

Court of Admiralty in England has exercised jurisdiction over a foreign ship rescued from captors, British seamen being among the salvors and libellants.[1]

It has been decided, in the Circuit Court of the United States for the Third Circuit, that the informer in a revenue case of forfeiture, where a condemnation has been decreed in the Admiralty, may institute by libel an original suit against the proceeds in the Registry, and that the Admiralty Courts of the United States have jurisdiction in such a case.[2] 58

It is well settled, that a master cannot sue in the Admiralty in England for his wages.[3] But a master, who pawned his person as a ransom for his vessel, which was taken by pirates, and redeemed himself, was allowed in England to sue in the Admiralty by a libel against the ship, and a prohibition was refused.[4] Courts of Admiralty in the United States allow payments to the master for advances and necessary disbursements abroad, of the nature

[1] The Two Friends, 1 Rob. R. 271.

[2] Westcoat *v.* Bradford, 4 Wash. C. C. R. 492.

[3] Abbott on Ship., Pt. 4, c. 4, § 1, p. 474; The Favorite, 2 Rob. R. 237.

[4] 6 Viner's Abr., Court of Admiralty, E. 30, p. 529; The Rainbow, Bee. Ad. R. 118; Wilson *v.* Bird, 1 Ld. Raym. R. 22; Tranter *v.* Watson, 2 Ld. Raym. R. 933.

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fore a compensation for saving it is made, the salvors may maintain a libel *in personam* for the salvage.—The Emblem, Daveis R. 61; See Supreme Court Rule 19.

In cases of salvage of private ships and cargoes, the freight on board belonging to the Government is equally subject to the Admiralty process *in rem* for the proportion due for salvage with that of private shippers.—The United States *v.* Wilder, 3 Sumner R. 308.

of liens, out of remnants and surplusages remaining in the Registry, from the proceeds of the sale of a ship by
59 their decree.[1](a) The master may sue *in personam* for his wages as master, but not for commissions as a factor.[2]

A mate may sue *in rem* and *in personam*, as he is a seaman, distinguishable from the other mariners only in title.[3] A cooper is also a seaman.[4] When the mate becomes the master in the course of the voyage, he may sue in the Admiralty as mate, for his services as such during the whole voyage; for his character of mate is not merged in his capacity as master.[5](b) A surgeon may also sue in the Admiralty for his stipulated wages.[6] A pilot may sue in the Admiralty, *in personam* as well as *in rem*, for his services in piloting vessels on the high seas, and into and from port.[7](c) The laws of the State of Massachusetts give a

[1] The Jersey, 1 Pet. Ad. R. 223.

[2] Willard *v.* Dorr, 3 Mason R. 91; Hammond's Case, 4 Mason R. 196; The Grand Turk, 1 Paine R. 78.

[3] Impey's Plead. 261; Bailey *v.* Grant, 1 Ld. Raym. R. 632; Robinett's Case, 2 Rob. R. 261; Savage's Case, 5 Mason R. 460.

[4] Thompson's Case, 6 Mason R.

[5] Read *v.* Chapman, 2 Str. R. 937; The Favorite, 2 Rob. R. 238.

[6] The Lethe, Bee. Ad. R. 424; Mills *v.* Long, Sayer R. 136; The Lord Hobart, 2 Dods. R. 104.

[7] The Nelson, 6 Rob. R. 227; The Anne, 1 Mason R. 508.

(a) The master, even in a case of maritime services, has no lien on the vessel for the payment of them.—The Steamboat Orleans *v.* Phœbus, 11 Peters, 175.

(b) The George, 1 Sumner, 51.

(c) The pilot, engineer, deck-hands and firemen on board a steamboat are

lien on the vessel for a limited time, in certain cases of pilotage, and in the Admiralty Court for that District, this lien is frequently enforced.[1] A wharfinger has a lien 60 on a foreign ship for wharfage, by the law of the Admiralty.[2] (a) The lien of seamen on the ship, for the payment of their wages, is recognised in the most ample manner in the United States; and they may, in the Admiralty, avail themselves of their three-fold remedy, by suit *in rem* against the ship, and by suits *in personam* against the master and the owners. (b) The right of seamen to enforce, by the Admiralty process against the ship, the payment of wages, is secured by the act of Congress for the government and regulation of seamen in the merchant service, (Act 1790, ch. 56, sec. 6.) The same right is given to seamen engaged in the bank and cod fisheries, for the recovery of their shares of the proceeds of such voyages, (Act 1813, ch. 2, sec. 2.)[3] This right has been held in Massa-

[1] Mass. Stat. 1796, ch. 85, § 12.

[2] Lewis's Case, 2 Gall. R. 483; The Gen. Smith, 4 Wheat. R. 438.

[3] Sheppard *v.* Taylor, 5 Pet. Sup. Ct. R. 675.

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entitled to sue for their wages in Admiralty.—The Steamboat Ohio, Gilpin R. 505.

The services must contribute to the navigation or preservation of the ship. Musicians cannot sue in the Admiralty.—The Superior, Gilpin R. 516; Thackeray *v.* The Farmer, Gilpin R. 529.

(a) The Schooner McDonough, Gilpin R. 101; The Phebe, Ware R. 354.

(b) In case of a restitution in value of a neutral ship which had been captured, the proceeds were held to represent the ship and freight, and to be subject to their liens.—Brown *v.* Lull, 2 Sumner R. 443.

Where any portions of a wrecked vessel have been recovered, the mariners are entitled to sue against the proceeds for their wages, although

chusetts to exist in all cases of maritime service, and a libel against the vessel by a seaman engaged in the mackerel fishery has been sustained.[1] In England, a claim by a seaman who had performed a whaling and a sealing voyage, was considered not sustainable as for wages in the Ad-
61 miralty, it being a contract containing unusual stipulations.[2] In Massachusetts, the shares of seamen employed in whaling voyages are considered as wages, the agreement for shares being only another mode of compensation than the form of wages.[3] Admiralty suits to obtain settlements of whaling voyages are often brought in the District Court of the United States for the District of Massachusetts. A father may sue in the Admiralty for the wages of his minor son.[4] A master may also sue for compensation for the marine services of his apprentice or slave.[5](a) A libel of a woman, for services on board a ship as a cook, has been sustained in the Admiralty in England.[6] A suit for wages has also been maintained there against an enemy ship under a British license.[7] American seamen, though

[1] Bush's Case, U. S. District Court, Mass.

[2] The Sydney Cove, 2 Dods. R. 11.

[3] Baxter v. Rodman, 3 Pick. R. 439; Harden v. Gordon, 2 Mason R. 544.

[4] Plummer v. Webb, 4 Mason R. 380.

[5] Emerson v. Howland, 1 Mason R. 45.

[6] The Jane & Matilda, 1 Hagg. R. 190.

[7] The Maria Theresa, 1 Dods. R. 303; The William Penn, 1 Pet. C. C. R. 110.

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no freight has been earned; and when the parts of the ship were preserved by third persons.—The Reliance, 2 Wm. Robinson R. 119.

(a) A person who is a slave, by the law of his domicil, may maintain an action in his own name in a country where slavery does not exist, for a personal tort within that jurisdiction.—Polydore v. Prince, Ware R. 402.

alien enemies, have also been allowed, in the Admiralty Courts in England, to libel a British vessel for their wages on a voyage authorized by a British license.[1] The Admiralty Courts of the United States will enforce the 62
payment of a bottomry bond, given for the repairs of a vessel employed as a cartel in the ports of an enemy, although the contract was made with an alien enemy; the rules of the Common Law not being applied with the same rigor in Courts acting under the general Law of Nations; when the trade is licensed by the government, the objection of the disability of the plaintiff on the ground of hostile alienage being extremely feeble.[2] A claim for subsistence due to seamen may be enforced in the Admiralty, being in the nature of a compensation for services, and considered to form a part of the original contract for wages.[3]

By an act of Congress, (Act 1803, ch. 62,) where an American seaman, whose name is borne in the certified list of the ship's company, is discharged with his own consent in a foreign country, or where a ship is sold (*a*) in a foreign country and her company discharged, three months' additional wages, besides the wages then due, are required to be paid into the hands of the American Consul, two thirds

[1] The Frederic, 1 Dods. R. 266.
[2] The William Penn, 1 Pet. C. C. R. 110.
[3] The Madonna, 1 Dods. R. 40.

(*a*) The act of Congress applies only to the case of a voluntary sale of the vessel, and not to a sale rendered necessary by misfortune. But the seaman in such a case is entitled to a sum, in addition to his wages, sufficient to defray the expenses of his return home, to be paid from the proceeds of the vessel.—The Dawn, Ware R. 485; The Dawn, Daveis R. 121.

whereof are to be paid to the seaman, on his engage-
63 ment on board any vessel to return home, and the remaining one third is retained in aid of a fund for the relief of distressed American seamen in foreign ports. It has been decided in the Supreme Court of the State of New York, that an action will not lie at Common Law for the recovery of these extra wages, which the master neglected to pay to the Consul.[1] Sir William Scott refused to sustain a libel instituted in the English Admiralty Court, with the consent of the American Consul, for the recovery of these extra wages, as he did not consider the claim founded on the shipping contract, or arising out of the general maritime law.[2] But, in the Admiralty Courts for the District of Massachusetts and the First Circuit, these additional wages are recoverable in a special libel for wages, and the one third of the extra wages due to the United States will be decreed to be paid into the Registry.[3] A libel has also been sustained in the District Court of the United States for the District of Massachusetts, in the name of the United States, for the recovery of the additional wages, which the mas-
64 ter had refused to pay to the Consul, on the discharge of a seaman in a foreign country.[4]

A seaman, falling sick or disabled in the discharge of his duty, may recover the expenses of his cure in the Admiralty.[5] (*a*)

[1] Ogden *v.* Orr, 12 Johns. R. 143; Sullivan *v.* Morgan, 11 Johns. R. 66.
[2] The Courtney, Edwards Ad. R. 239.
[3] Emerson *v.* Howland, 1 Mason R. 45; Townsend's Case, 4 Mason R. 541. [4] Weld's Case. U. S. Dist. Ct., Mass., March T. 1831.
[5] Harden *v.* Gordon, 2 Mason R. 541; Canfield's Case, 6 Mason R.

(*a*) If a seaman contracts disease by his own vices or faults, and in defi-

A libel against a Post-Office Packet was sustained in England, there being no objection on the part of the Post-Office Department, which the Court considered as relieving the case from difficulties, which otherwise might have existed, on account of the danger to the public interest from detention of vessels in this service.[1] Seamen may institute Admiralty proceedings against letters of marque for the recovery of their wages, but not against public vessels, either foreign or domestic; for letters of marque are trading vessels, with a commission to make prizes, and differ from public ships of war, where the seamen look to the government for their wages, and from privateers, where the only compensation of the seaman is a share of the prizes which may be captured.[2]

The Statute 4 Ann, cap. 16, § 17, puts seamen's 65
wages very clearly, though by implication, upon a legal footing, with respect to the limitation of a suit. It provides, that all suits and actions in the Court of Admiralty

[1] The Lord Hobart, 2 Dods. R. 100.

[2] The Bellona, Bee. Ad. R. 112; The South Carolina, ibid, 422.

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ance of the counsel and commands of his superior officers, the vessel is not liable for the expenses of his cure.—Pierce *v.* Patton, Gilpin R. 438.

Where a seaman in a foreign port contracts an ordinary disease without any fault of his, and remains on board a vessel, which is properly provided with a chest of medicines, the expenses for the attendance and advice of a physician, if evidently necessary for the safety of his life, are to be deducted from his wages.—Holmes *v.* Hutchinson, Gilpin R. 447.

The owners will not be exempted from the expenses of medical attendance, although there be a medicine chest on board, when the seaman cannot have the benefit of the medicine, because he is removed on shore, or because there is no person on board by whom the medicine can be administered.—The Forrest, Ware R. 420.

for seamen's wages, shall be commenced and sued within six years after the causes of such suits or actions shall accrue.[1]

Although there be no statute of limitations of the United States, applying to Admiralty proceedings in private suits, yet stale claims will not be entertained.[2] (a) The Admiralty will not take jurisdiction of independent set-offs. Those allowed are principally advances on the particular demand in controversy; cases operating as a diminution of the claim sued, on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of a violation of the contract.[3] A plea of set-off, in a suit for wages, is rejected in the Court of Admiralty in England; but it is allowed when damage occasioned by gross negligence of the party is pleaded as a set-off.[4]

66 The Admiralty Courts of the United States do not, except under very particular circumstances, entertain jurisdiction of causes of seamen of foreign vessels for the recovery of their wages, it being considered generally proper to refer them to the tribunals of their own country.[5] The Admiralty Court in England usually abstains from exercising jurisdiction in such cases; but the English Admiralty exercises jurisdiction in cases of the claims of foreign seamen,

[1] See Doug. R. 101, *note*. [2] Willard *v.* Dorr, 3 Mason R. 95, 161.
[3] Ibid, 171; The Mentor, 4 Mason R. 84.
[4] The Lady Campbell, 2 Hagg. R. 14, *note*; The New Phœnix, ibid, 420.
[5] The Nancy, Bee. Ad. R. 221.

(a) The Sarah Ann, 2 Sumner R. 207, 212.

with the consent of the accredited agent of the government to which the seamen are subject.[1]

In the State of Massachusetts it has been provided by statute, that innocent owners of vessels shall not be liable for the misconduct of the master and crew beyond the value of the vessel and freight; and a bill in equity is sustainable by the parties injured, in order that the value of the vessel and freight may be discovered, and an average distribution of the damages obtained; and it is provided, that the charterer, when navigating the vessel at his own expense, shall be deemed the owner within the meaning of the statute, and the general owner of the vessel may re- 67
cover of him the amount of the loss or damage compensated or satisfied from the freight or the proceeds of the sale of the vessel, or both.[2] The Admiralty Courts, unquestionably, have the power to enforce the provision of this State law, by the flexible and strong process of the Admiralty Court, as in other cases of liens on ships created by the State laws.[3] (*a*)

The Admiralty Courts in the United States possess juris-

[1] The Courtney, Edwards R. 241; The Two Friends, 1 Rob. R. 279.

[2] Mass. Laws, Stat. 1818, ch. 122.

[3] The Fulton, 1 Paine R. 626; The Gen. Smith, 4 Wheat. R. 438; Ramsay *v.* Allegre, 12 Wheat. R. 611.

(*a*) Where a lien on a vessel is given by a State law, the District Court rightfully obtains jurisdiction; and may exercise it, not according to the provisions of the State Law, but according to the mode of proceeding in Admiralty.—Davis *v.* A New Brig, Gilpin R. 473; See The Steamboat Orleans *v.* Phœbus, 11 Peters R. 175.

Local Legislatures have no power to modify or repeal the provisions of the general maritime law.—The Barque Chusan, 2 Story R. 456.

diction to the fullest extent in the case of a disagreement among part owners respecting the employment of a ship. It has been the usage in the Admiralty Court in England, from the most remote times, to entertain applications on the part of a minority of the owners, to compel the majority, employing a ship against the will of the other owners, to give security for the restitution of the ship, or the payment of the value of the shares of the dissentient owners; and, if the minority had possession, the majority in value might obtain possession of the ship and send her to sea by
68 giving such security.[1] In a case, which is supposed to have settled the law on this subject and established this jurisdiction of the Admiralty, Chief Justice Lee said, "I have no doubt but the Admiralty has a power in this case, and this jurisdiction has been allowed to that Court for the public good."[2] This power of the Admiralty is recognised in the United States, and always exerted when cases arise which require the aid of the Court.[3] In a case decided by Mr. Justice Washington, in the Circuit Court of the United States for the District of Pennsylvania, where there was a disagreement between part owners, possessing an equality of interest in the ship, respecting the appointment of a master, it was held that a sale might be decreed upon the authority of the Ordinance of Louis XIV., which, in a case of disagreement between owners of a ship, possessing an equality of interest, respecting the undertaking a particular voyage, enables one part owner to force the other to a sale. This Ordinance was considered by the Court as

[1] 2 Bro. Civ. and Ad. Law, 131; Abbott on Ship. Pt. 1, c. 3, § 4, p. 71.
[2] Ouston v. Hebden, 1 Wils. R. 101; The Apollo, 1 Hagg. R. 306.
[3] Willings et al. v. Blight, 2 Pet. Ad. R. 288.

a wise and equitable provision, "constituting a part of the maritime Law of Nations."[1] (a) In a case of equality of interest and a disagreement of the owners it is the 69 practice of the Admiralty in England to sustain an application for the interposition of the Court.[2]

In Scotland, the remedy for the dissentient owners is to compel a sale, or, that the other owners shall give or take the ship at a fixed price; and the ordinances of Rotterdam give the owners of the larger part of the ship the power to sell on general account, or to freight and fit her out at the common expense, against the will of the minority.[3]

In the United States, the Admiralty Courts entertain, not only possessory, but petitory, or proprietary suits, respecting ships.[4]

This chapter should not be concluded without bringing to the notice of the reader the opinion of one, who was a distinguished Justice of the Supreme Court of the United States, against the extent of the Admiralty jurisdiction sustained by the cases which have been referred to. Mr. Justice Johnson delivered a learned opinion, in the case of Ramsay *v.* Allegre,[5] in which he examined the 70

[1] The Seneca, Conk. Prac. 155.

[2] Abbott on Ship. Pt. 1, c. 3, § 6, p. 75.

[3] 1 Bell's Comm. 503; 2 Magens on Ins. 108; 3 Kent's Comm. 116, *note*, (p. 153, 2d Ed.) [4] The Tilton, 5 Mason R. 472. [5] 12 Wheat. R. 460.

(a) The jurisdiction of Courts of Admiralty in cases of part owners having *unequal* interests, is not and never has been applied to direct a sale upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages.—The Steamboat Orleans *v.* Phœbus, 11 Peters R. 175.

subject of the Admiralty jurisdiction with great clearness and vigor, and maintained the following propositions respecting the Admiralty Court.

"That in case of contracts it has no jurisdiction at all *in personam*, except as incident to the exercise of its jurisdiction *in rem*.

"That with regard to the contracts of shipwrights and material-men, in her home port, the vessel cannot be subjected, unless by express hypothecation by the owner.

"That on her voyage, and where the master is destitute of other means of raising the necessary funds, she may be so subjected by the master, but it must be by actual hypothecation.

"But that, when the ship has been sold for other claims, and the money is in the Registry, so that the master no longer has it in his power to raise money on her bottom to satisfy demands which have been legally incurred, cases may arise in which the claims of material-men and shipwrights, and of the master himself, may be sustained without actual hypothecation."

The learned Judge considered, that the Admiralty has no jurisdiction, except *in rem*, to enforce a maritime lien, and that, in all cases where those who claim jurisdiction for the Admiralty admit that the Common Law Courts
71 have a concurrent jurisdiction, "with the exception of seamen's wages," the Admiralty jurisdiction does not lawfully exist; and he observes, that, "if the Common Law can try the cause and give full redress, that alone takes away the Admiralty jurisdiction." (*a*)

(*a*) See Rules of the U. S. Supreme Court, 12, 14, 17, 18.

CHAPTER II. 72

GENERAL PRINCIPLES OF ADMIRALTY PRACTICE.

THE practice of the Admiralty Courts, which are Courts of Equity, is modeled upon the course of proceedings according to the Civil Law.[1] The Admiralty Courts, being tribunals which administer the Law of Nations, have adopted the practice of the Courts of the Civil Law, which system of jurisprudence is the foundation of the judicial institutions of the Christian nations on the continent of Europe, and of their colonies. Hence there is a similarity of practice in Courts of Admiralty wherever established, though undoubtedly marked in every country with some peculiarities of proceeding, borrowed from the practice of the municipal courts.

The mode of obtaining, in a court of justice, a right which is withheld, or redress for a wrong which has been sustained, in a case of private controversy, is by a suit or action at law, which is defined in the Civil Law to be *jus persequendi in judicio quod sibi debetur*.[2] This definition is also adopted by ancient and modern Common 73
Law writers.[3]

In the early ages of the Civil Law, as well as of the Common Law, the legal practice was simple and rude; but in the course of time refinements were introduced, until the

[1] The Minerva, 1 Hagg. R. 357; 2 Bro. Civ. and Ad. Law, 348.
[2] Inst., *Lib. IV., Tit. VI., De Actionibus.* [3] 3 Black. Comm. 116.

proceedings at length became dilatory, complicated, and expensive,—under both systems defeating in many cases the object for which legal proceedings are devised, the administering of justice.

It was anciently a maxim of the Civil Law, that no one could represent another in any legal proceeding, and the introduction of proxies or proctors is derived from a fiction of the Roman Law; *Erat regula juris, per extraneam personam nil adquiri posse; hinc nemo pro alio agere poterat in judiciis.*[1] The *actor*, or plaintiff, formerly arrested the *reus*, or defendant, without any writ or warrant, called upon the bystanders to witness the arrest, and brought his adversary before the Prætor or Judge. This custom of arrest *obtorto collo* by the plaintiff seems to be alluded to in the following passages of the New Testament:

"But the same servant went out, and found one of
74 his fellow servants, which owed him an hundred pence:
and he laid hands on him, and took him by the throat, saying, Pay me that thou owest."[2]

"Agree with thine adversary quickly whiles thou art in the way with him: lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison."[3]

It will be recollected that, at the time the Gospels were written, Judea was under the dominion of the Roman Emperor; that the Roman tribunals were established in that country, and the Roman laws, which always accompanied the progress of the Roman arms, were extended to the Holy Land. It is probable that this custom of arrest gave rise to

[1] Heinec. Antiq. Lib. 4, T. 10, § 2. [2] Mat. xviii. 28. Id. v. 25.

the Common Law doctrine, that, to constitute a valid service by way of arrest, the person must be corporally touched by the officer or voluntarily submitted to his custody.[1] A party could not be arrested unless found abroad; for he could not be arrested, or even summoned, in his own house, which was considered as his castle. This principle of the Civil Law, probably, gave rise to the Common Law doctrine on this subject, privileging the domestic sanctuary, and might have been carried into Britain, at the time of the 75 Roman conquest, with those Latin maxims, scattered through all the Common Law books, which are evidently borrowed from the Civil Law institutions and writers, containing the doctrines of the laws, and expressed in the language, of the ancient conquerors of Britain. If the party summoned remained in his house, so that he could not be arrested, a public edict was affixed to his door, requiring his appearance before the Judge. The harshness and violence of this mode of proceeding in time yielded to the increasing knowledge, refinement of manners, and extent of business among the Roman people. Before the time of Justinian, parties were summoned by the apparitors or officers of the court, and corporal arrest in civil cases was disused. The defendant was summoned thrice, and if, after three successive citations or notifications, he did not appear, a peremptory summons issued. If this was neglected, the *primum decretum* was rendered, by which process issued against his property.[2]

By the *primum decretum*, or first decree, the plaintiff, in a real action or suit for some specific thing, was put in

[1] 3 Black. Comm. 288. [2] 2 Bro. Civ. and Ad. Law, c. 8.

76 possession of the thing sued for, and, in personal actions or suits for debts or damages, in possession of all or a part of the property attached or seized, as a security for the satisfaction of his claim. After a year, in case the defendant did not appear within that time, and give security to abide the judgment, which relieved the attachment, the *secundum decretum* was rendered, which gave a right *pro usu capiendi et præscribendi*, by which the defendant's property might be sold to satisfy the plaintiff's claim. From this practice of the Civil Law, Lord Bacon is supposed to have derived the practice of sequestrations, which he introduced into the practice of the Chancery.[1] The Civil Law practice of summoning a party by a *citatio publica*, or a *citatio viis et modis*, has probably given rise to the practice in the Admiralty, Probate, and Ecclesiastical Courts, of summoning parties by notifications posted in public places.[2]

Anciently, when the defendant was arrested and brought before the Judge, a time of trial was appointed, usually the next day but one following, and the defendant was imprisoned, or gave security for his appearance. The
77 plaintiff then demanded a form of action, and stated verbally his grounds of complaint, to which the defendant also responded verbally, and the cause was then tried, and a judgment or decree rendered.[3]

If the plaintiff did not appear and prosecute his suit within a year, he was summoned by three citations, and if they were neglected his suit was dismissed. In the progress of

[1] 2 Bro. Civ. and Ad. Law, c. 8.
[2] Manro *v.* Almeida, 10 Wheat. R. 490; Consett's Prac. 35.
[3] 2 Bro. Civ. and Ad. Law, c. 8.

improvement in the Roman State, written forms of proceeding were devised, suited to the various and increasing business of the Courts. Cicero, in his oration for Roscius, observes: "*Sunt jura, sunt formulæ de omnibus rebus constitutæ, ne quis, aut in genere injuriæ, aut in ratione actionis, errare possit; expressæ sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuriâ, publicæ a Prætore formulæ, ad quas privata lis accommodetur.*"[1]

The forms of practice were for a great length of time preserved, as a state secret, in the records of the Pontifical College. At length, Cn. Flavius, the Secretary of Appius Claudius, published them, in the year of the City 490; and this publication was called the *Jus Civile Flavianum*. "*Civile Jus, repositum in penetralibus Pontificum evulgavit, fastosque circa forum in albo proposuit, ut quomodo lege agi posset, sciretur.*"[2] These are the words of Livy. Cicero also speaks of this publication. "*Inventus est scriba quidam, Cn. Flavius, qui cornicum oculos confixerit, et singulis diebus ediscendos fastos populo proposuerit, et ab ipsis cautis jureconsultis eorum sapientiam compilarit.*"[3]

When both the parties to a suit appeared, each was required to give security to the other. The plaintiff gave security to the defendant to pay the costs, in case he should not sustain his action, and the defendant gave security to the plaintiff, to satisfy the judgment which might be recovered against him. According to the modern and improved practice, the plaintiff gave his written statement of his cause of action, or his declaration or libel, a copy of which was fur-

[1] Pro Roscio Com. c. 8. [2] Livy, ix. 46. [3] Cic. Pro Murenâ, c. 11.

nished the defendant. The defendant presented his exceptions, in the nature of pleas in abatement, or demurrers, or a defensive allegation, or answer, like the general issue, or plea in bar, of the Common Law. When the issue was made up, and the pleadings closed, this state of the case was called a contestation of suit. The suit was then
79 said to commence, though, for the purpose of interrupting prescription and limitation, it commenced from the citation, as the issuing a writ is the commencement of an action by the Common Law.[1]

In the United States, it has been declared by act of Congress, that the forms and modes of proceeding, in causes of Admiralty and maritime jurisdiction, shall be according to the course of the Civil Law.[2] The Courts of Admiralty, in their forms and modes of proceeding, are also required to be regulated by the principles, rules, and usages which belong to Courts of Admiralty, as contradistinguished from Courts of Common Law, subject to such alterations as the Courts shall in their discretion deem expedient, and such directions as the Supreme Court of the United States may, by rule, prescribe to the other Courts.[3] All the Courts of the United States are also authorized to make all necessary rules, not repugnant to the laws of the United States, for the orderly conducting of business.[4] (*a*)

[1] 2 Bro. Civ. and Ad. Law, c. 8; Badger *v.* Phinney, 15 Mass. R. 359; Ford *v.* Phillips, 18 Mass. R. 202.

[2] Act of Cong. 1789, ch. 21, § 2; The Adeline, 9 Cranch R. 244.

[3] Act of Cong. 1792, ch. 36, § 2. [4] Act of Cong. 1789, ch. 20, § 17.

(*a*) The new rules of practice of the Supreme Court of the United States

In the Admiralty Courts of the United States there is probably much greater simplicity in the proceedings, 80 than in those of other nations. Our practice was at first formed in the Colonial Vice-Admiralty Courts, established in the Provinces before the Revolution, engrafted upon the British practice. This is considered by the Supreme Court of the United States to be the Admiralty practice intended in the act of Congress to which reference has been made.[1]

Actions in the Admiralty are of two kinds, *in rem* and *in personam*. This corresponds with the *divisio prima*, into real and personal actions, of the Civil Law.[2] An action *in rem* is where the object of the suit is to obtain some specific thing, as, in a possessory or a proprietary cause respecting a ship, to recover the ship claimed. A prize cause is also an action *in rem*, to obtain a condemnation of property captured, and becoming the right of the captor *jure belli*, which condemnation, by the modern Law of Nations, is considered necessary to confirm the title of the captor.[3] A prosecution in the Admiralty, in a cause there cognizable, to 81 obtain a condemnation of property forfeited, is also an action *in rem*. A proceeding in Admiralty to enforce a maritime lien upon the property libelled, by obtaining the pos-

[1] Manro *v.* Almeida, 10 Wheat. R. 489.

[2] Inst. Lib. 4, Tit. 6, § 2–14.

[3] The Flad Oyen, 1 Rob. R. 139; Abbott on Ship. (Am. Ed. 1829,) p. 17, *note*; The Kierlighett, 3 Rob. R. 97, *note*; Rose *v.* Hindley, 4 Cranch R. 508; Carthew R. 423; Hudson *v.* Guestier, 4 Cranch R. 293.

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in Admiralty, were made in pursuance of the act of Congress of the 23d of August, 1842, ch. 188, and govern all Admiralty Courts in the United States, in matters of practice. They are included in the Appendix, at the end of this volume.

session of the property and satisfying the claim by means of a judicial sale, is also an action *in rem.*

In the English Admiralty Court, there is rendered, in the first instance, in an action *in rem*, the *decretum primum* of the Civil Law, whereby the possession of the property is decreed to the libellant, in order to enforce his lien; and a subsequent decree, the *decretum secundum*, is necessary to obtain a sale, in order that the debt may be satisfied from the proceeds, which is obtained upon a suggestion, that the property is of a perishable nature. The effect of the first decree is to put the party in possession of the thing libelled, and all proceedings of sale, and power over the proceeds, are by subsequent application to the Court.[1] Something similar to this course of proceeding exists in the practice of Courts of Admiralty in the United States. A monition, or Admiralty summons, when a ship is libelled in order to enforce a lien, is usually issued, in the first instance, to the master or
82 owner or person having the custody of the ship, to appear and show cause why Admiralty process *in rem* should not be awarded. A preliminary hearing is frequently had, and the case examined upon the return of the monition; and, if the libellant's case is made out *primâ facie*, process issues *in rem*, (*a*) unless a sufficient stipulation be

[1] 2 Bro. Civ. and Ad. Law, c. 9; The Exeter, 1 Rob. R. 175.

(*a*) In all proceedings *in rem*, when a Court of Admiralty has jurisdiction over the thing itself, it is wholly unimportant to whom it belongs.—1 Story R. 531; The Bee, Ware R. 332; The Ada, Daveis R. 407.

The District Courts, as Courts of Admiralty, may award attachments against the property of foreign corporations found within their local jurisdiction.—Clarke *v.* New-Jersey Steam Navigation Co., 1 Story R. 531.

given to secure the debts and costs. This seems to resemble the *primum decretum*, as it secures to the libellant the possession of the ship, or a sufficient security therefor. Public notice is given, by notifications affixed to the mainmast of the ship, and posted in public places, and by newspaper advertisements, that a trial will be had upon the libel, at some future day; usually, in Massachusetts, fourteen days after the decree authorizing the issuing of process *in rem*. At the time of the trial, a final decree is made fixing the amount due, and authorizing the sale for the payment of the debt and costs from the proceeds, which are returned into the Registry of the Court. This is somewhat analogous to the *decretum secundum* of the British Admiralty Courts, derived from the practice of the Civil Law. In the Admiralty Courts of the United States, particularly in cases for the recovery of seamen's wages, the trial is often at the time of the first hearing and decree. But, in all cases, a full examination is allowed, when justice requires it, at a second 83
hearing and last stage of the cause.

An action *in personam* is where the object of the suit is to recover of the party, against whom it is instituted, damages for the breach of some maritime contract, or on account of some tort or injury to person or property, committed in some place within the Admiralty jurisdiction.

A distinction exists between proprietary and possessory causes. The former class is where the object of the suit is to try the title to ships, and the English Admiralty Courts now generally decline jurisdiction in such cases. The latter class is where there is no dispute about the title, but where the object of the suit is merely to obtain the possession, as in cases of dispute among part owners relative to the employ-

ment of ships and the appointment of masters. In the United States this distinction is merely nominal, for here both classes of cases are considered to be within the Admiralty jurisdiction.[1]

A division of actions exists in the Civil Law Courts into plenary and summary causes. The former are those in which all "the law's delay," and all the forms and
84 solemnities of the practice of the Courts of the Civil Law, are observed. The latter are those where justice is administered in a plain and prompt manner. All Admiralty suits in the British Courts are summary causes, and justice is administered *levato velo*.[2] In the United States no such distinction exists in the practice of the Admiralty Courts; for their practice is, in all cases, marked with simplicity and promptitude in the whole progress of a suit, from the District to the Circuit and Supreme Courts of the United States.

Parties to a suit in Admiralty are called the libellant and respondent, corresponding, in personal actions, with the plaintiff and defendant in Common Law Courts. When the suit is *in rem*, the cause is entitled in the name of the libellant against the thing libelled, and preserves that title through the whole progress of the suit; and, when a person is authorized and admitted to defend against the libel, he is called the claimant.[3]

In prize causes, in the Admiralty Courts of the United

[1] The Tilton, 5 Mason R. 465.

[2] Clerke's Prax., Tit. 19; 2 Bro. Civ. and Ad. Law, 413.

[3] The U. States *v.* 1960 Bags of Coffee, 8 Cranch R. 398; The U. States *v.* The Mars, ibid, 417; 30 Hhds. of Sugar, (Bentzon claimant,) *v.* Boyle et al., 9 Cranch R. 191.

States, the proceedings are usually instituted and conducted in the name of the captain or commander of the 85
capturing vessel, in behalf of all who may be interested against the prize, the condemnation of which is sought. In causes of maritime salvage, the libel against the property saved is generally in the name of the master of the saving vessel, in behalf of the owners, master, mariners, and all persons concerned in the salvage, and the names of all the parties interested are made known by petitions or acts of Court, before the final decree of distribution of the proceeds of the property saved among the salvors. But the proper course is to introduce, with allegations of their interests, the names of all the co-salvors; and if any are omitted, they can make themselves parties to the cause by petition.[1]

All persons interested in the cause of action may be joined as libellants; in a collision cause, for instance, all the owners of the ship which is injured, the shippers of goods, and all persons affected by the injury which is the subject of the suit. In such a case, also, the master of the ship which is injured may, in the name of all persons interested, institute one action in the Admiralty, where, instead of the numerous actions which at the Common Law would 86
be necessary in such a case, one plea, trial, and sentence determine the whole affair.[2] In the case of a libel by seamen against a ship, to obtain the payment of their wages, it is provided by an act of Congress, that, in such

[1] The Henry Ewbank, 6 Mason R.; S. C., Am. Jurist, Vol. XII. p. 63, July, 1834.

[2] 2 Bro. Civ. and Ad. Law, 112; Sir L. Jenkins' Works, Vol. II. 64.

suit, "all the seamen or mariners, having cause of complaint of a like kind against the same ship or vessel, shall be joined as complainants."[1] It is considered, in the Supreme Court of the United States, that the joinder in one libel of all the seamen as plaintiffs, which in England is a beneficial privilege, is in the United States absolutely required.[2]

By the equity of this statute, seamen, having like cause of action, would probably be required to join in an Admiralty suit *in personam* against the master or owners, for the recovery of wages. It is not known, however, that this point of practice has ever been directly determined. It has often happened in practice, that all the seamen have not been joined in a libel against a ship for wages, and some have afterwards sued in Admiralty. When good rea-
87 sons exist for the omission, the non-joinder has not been considered injurious, since all which can be affected is the costs; for in all Admiralty causes costs are entirely within the control of the Court, and may be allowed or refused, as the circumstances of each case may require. (*a*)

Parties, improperly introduced, may be struck out of the libel, or new parties added by a supplemental libel or pe-

[1] Act of Cong. 1790, ch. 56, § 6.

[2] Oliver et al. *v.* Alexander et al., 6 Pet. Sup. Ct. R. 147.

(*a*) Material men and mechanics having privileged claims against a vessel, may unite in one libel; or if a libel has been filed by any one separately, then others may come in by petition, and make themselves parties to the suit.—The Hull of a New Ship, Davis R. 199.

tition.[1] (*a*) This is the settled practice in the District Court of the United States for the District of Massachusetts.

The death of a party does not in Admiralty necessarily abate the suit. Actions for injuries to the person do not survive to or against the representatives of either party; but actions respecting property survive, and the representatives may become or be required to become parties by a supplemental libel.[2] But this does not apply to cases of personal wrongs, which die with the person, as at Common Law, the maxim of which, *Actio personalis moritur cum persona*, is derived from the Civil Law.[3]

By the rules (*b*) of the District Court of the United States, for the Southern District of New-York, it is provided, that when, from the death of any of the parties, a 88 change of interest in the suit, defect in the pleadings, or otherwise, new parties to the suit are necessary, the persons required to be made parties may be made such, either by a petition on their part, or by a supplemental libel by the adverse party.

Minors frequently institute suits alone, and in conjunction with others, without the intervention of a *prochein ami*,

[1] The Pitt, 2 Hagg. R. 149, *note*. [2] Hall's Ad. Prac. 21, 22.
[3] Penhallow *v.* Doane, 3 Dall. R. 78, 102; 2 Roll. Rep. 18; 2 Lev. 6.

(*a*) In Admiralty proceedings a supplemental libel, alleging new matter, and an answer thereto, may be filed after appeal, at the discretion of the Court.

In case of a supplemental libel being filed after closing the testimony on the original libel, *in prize causes*, the new testimony taken must be applicable merely to the new allegations, but in other causes this rule is much relaxed.—The Boston and Cargo, 1 Sumner R. 328.

(*b*) See Rule 148.

in the District Court of the United States for the District of Massachusetts; and it is not known that any exception has ever been taken to this practice. Sometimes in that Court minors have sued by *prochein ami.* It is to be presumed, that, if a minor should sue in the Admiralty for his services, which may belong to his master, if he should be an indented apprentice, or to his father, or, in the State of Massachusetts, to his mother, if the father be dead, the Court would permit the master or parent to intervene, by petition, and become a party to the proceedings, for the protection of the master's or parent's interest in the services of the minor. It is the general practice of Courts of Admiralty, in cases of salvage, to decree that a minor's share of the reward shall be his own property. (*a*)

In Admiralty suits *in personam*, all causes of action
89 of Admiralty cognizance, existing between the same parties, whether founded on contract or tort, may be joined in the libel and stated in distinct articles, as in several counts in a declaration at Common Law. (*b*) In such a

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(*a*) Where the father's name was used as *prochein ami*, and he settled the suit privately without the knowledge of the minor's counsel, and gave a receipt in full, the receipt was set aside, and full wages decreed to the minor. —The Etna, Ware R. 432.

(*b*) It is very irregular and contrary to the known principles of Courts of Admiralty to allow in a libel *in rem*, and *quasi for possession*, the introduction of matters of an entirely different character; such as an account of the vessel's earnings, or the claim of a part owner for his wages and advances as master.—The Steamboat Orleans *v.* Phœbus, 11 Peters R. 175; See Leland *v.* The Medora, 2 Woodbury & Minot's R. 92; The Citizens' Bank *v.* The Nantucket St. Co., 2 Story R. 57; New Rules, 14, 17.

A libel against two persons, charging each with a separate and distinct

case, allowances of additional costs would be reasonable, and, probably, would be made by the Court. An action in Admiralty has been sustained, in the District Court of the United States for the District of Massachusetts, by a mate against a master of a ship for wrongfully dismissing and degrading him from his station, and an article or count for wages was joined in the libel.[1] It is also allowed, but not required, in that Court, to join in distinct articles causes of action *ex contractu* and *ex delicto* in the same libel.[2] As there is no distinction of actions in the Admiralty as in the Common Law practice of debt, covenant, assumpsit, trespass, trespass on the case, &c., there is no practical difficulty in the joinder of various causes of action, existing between the same parties, *ex contractu* and *ex delicto*, in the same libel. At Common Law there may be many counts in the declaration of the same nature, though for different causes of action, and it is as practicable to try in the same suit several claims of a different, as of a similar 90 character. In the Admiralty, the Judge can as well try several causes of action between the same parties, joined in one libel, and presented separately in distinct articles, as if they were presented in different libels; for in both cases the separate claims must be separately considered. (*a*) But one

[1] Paty's Case, U. S. Dist. Ct., Mass.

[2] Ryan's Case, U. S. Dist. Ct., Mass., Sept. Term, 1831.

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act of assault and battery, cannot be sustained.—Thomas *v.* Lane, 2 Sumner R. 1.

Rules 13, 14, 15, New Rules of the U. S. Supreme Court, allow the joinder of suits *in rem* and *in personam* in certain cases.—See Rules, Appendix.

(*a*) If a seaman brings a libel against the master for a tortious discharge,

inconvenience is recollected, which can arise from this practice; and this exists in the case of a joinder of different causes of action of the same nature in the suit, as well as where there is a joinder in the suit of causes of action differing in their nature. An inconvenience may possibly arise in relation to the right of appeal. An appeal is allowed, to the Circuit Court of the United States, from the final judgments or decrees of the District Courts, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars.[1] A decree, founded upon various substantive causes of action, may exceed the sum of fifty dollars, where an appeal would be allowable; when, if the respective causes of action had been presented in distinct libels and suits, the decree in each case might have been for a less sum than fifty dollars, where an appeal would
91 not be authorized. But this difficulty is imaginary or may be easily obviated; for the Judge might make a separate decree upon each article in the libel, and allow appeals only upon those articles where the decree should be made for more than fifty dollars. It is not known that this point of practice has ever been distinctly settled; but it is a well established practice, that there may be separate decrees on the same suit on one libel, as in the case of various

[1] Act of Cong. 1803, ch. 93, § 2.

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and the master has detained his clothing, the value of it may be recovered in the same libel.—Hutchinson *v.* Coombs, Ware R. 65.

An action of damages, as for assault and battery, against the master, cannot be joined in the same libel with an action for wages, if it be excepted to.—Pratt *v.* Thomas, Ware's R. 427; Contra, Betts' Pr. 20; Benedict's Pr. 219.

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distinct claims of seamen, who are required to join in a libel against the ship for wages.[1] In such a case no appeal is allowed, where the decree on a particular claim is for a sum less than fifty dollars, although the amount of the whole sum awarded to the libellants may exceed fifty dollars. In such cases an appeal is allowed, in relation to the claims in the libel, where the decrees exceed fifty dollars.

It has been held in the English Admiralty, that, where separate actions are commenced upon several bottomry bonds upon the same ship, they may, upon petition, be consolidated.[2] (*a*)

A previous request of payment of a debt, where it can be conveniently made, is considered requisite to 92 entitle a party to a decree for costs. It has been well observed by Common Law writers, that, had a previous request been in all cases considered requisite to the commencement of a suit, many vexatious actions would have been prevented.[3]

The doctrine of the Common Law respecting the necessity of notice before the commencement of a suit, where the facts are peculiarly within the knowledge of the plaintiff, is recognised in the Admiralty practice. This was lately decided in the District Court of the United States for the Dis-

[1] Oliver et al. *v.* Alexander et al., 6 Pet. Sup. Ct. R. 147.
[2] The Albion, 1 Hagg. R. 333.
[3] 1 Chitty on Plead. 362, (6th Am. from the 5th Lond. Ed.)

(*a*) A libellant may unite in one libel, an allegation founded on the hypothecation implied by law for money advanced for repairs, with an allegation on a bottomry bond, given for the same consideration.—The Hunter, Ware R. 249.

trict of Massachusetts. In the case where this point was ruled, the libellant was a passenger in a ship owned by the respondent, which during the voyage was wrecked. The master procured another vessel to transport the passenger to the place of destination; and, upon his arrival there, the master of the latter vessel required him to pay a sum of money, which demand the master of the wrecked ship had no reason to expect would be made, and neither he nor the owner had any notice of this payment before the commencement of the suit. A libel was instituted against the owner for a breach of the contract of passage; and in
93 the course of the pleadings, the fact appeared, that no notice was given of the payment of the sum of money which was the real cause of the action, and, this sum being tendered in Court, a decree was rendered for the respondent.[1]

There is a peculiar statutory provision in the United States respecting the commencement of a suit in the Admiralty against the ship by seamen, for the recovery of their wages. It is contained in the following section of the act of Congress "for the government and regulation of seamen in the merchants' service."

"Sec. 6. That every seaman or mariner shall be entitled to demand and receive, from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him, at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and

[1] Carliss v. Gray, U. S. Dist. Court, Mass., Dec. Term, 1833.

the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise be- 94
tween the master and seamen or mariners, touching the said wages, it shall be lawful for the Judge of the District where said ship or vessel shall be, or in case his residence shall be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of Admiralty Courts, to answer for the said wages. And if the master shall neglect to appear, or, appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the Court of the District, that there is sufficient cause of complaint whereon to found Admiralty process, and thereupon the clerk of such Court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said Court, and final judgment be given according to the course of Admiralty Courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on 95
the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute;

otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at Common Law for the recovery of his wages, or from immediate process out of any Court having Admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."[1]

Upon this section of the act of Congress, there have been various decisions. It has been decided, in the Supreme Court of the United States, that the right to Admiralty process against the ship, for the recovery of seamen's wages, exists only in the case of a service rendered substantially upon the sea, or upon waters within the ebb and flow
96 of the tide; but that the jurisdiction exists, though the commencement or termination of a maritime voyage may be at a place beyond the reach of the tide.[2] (a) It has been held, in the District Court of the United States for the Eastern District of Pennsylvania, that the ten days are

[1] Act of Congress, 1790, ch. 56, § 6.

[2] The Thomas Jefferson, 10 Wheat. R. 428.

(a) The Steamboat Orleans v. Phœbus, 11 Peters R. 175; Waring v. Clarke, 5 Howard's S. C. R. 441; The Sloop Pekin, Gilpin R. 203; The Steamboat Ohio, Gilpin R. 506.

Steamboats and lighters engaged in trade or commerce on tide waters, and the seamen on board, are within Admiralty jurisdiction; but not ferry-boats, or those engaged in ordinary traffic along the shores.—Thackeray v. The Farmer, Gilpin R. 532.

allowed to enable the master and merchant to collect the freight, and ascertain whether there has been any negligence or embezzlement and misconduct, which may furnish the grounds for a just set-off to the claim for wages; and that the ten days are allowable, and sometimes fifteen, and in very peculiar cases a longer period, to discharge the cargo, before the wages are payable. It has also been decided in that Court, that the end of the voyage, and the discharge of the cargo, are separate and distinct subjects; that the voyage is ended when the ship is safely moored or made fast to the wharf at the port of discharge; that there can be no forfeitures after the voyage is ended; and that, when an additional duty exists to unlade the cargo, the seamen are only answerable in damages for neglect or refusal.[1] (a) In the Supreme Court of the State of New 97
York a different decision has been made, and it has been there held that, where seamen are bound by the shipping articles to unlade the vessel at her return port of delivery, and refuse to do so, their wages are forfeited.[2]

But the case of The Happy Return, before decided in the Pennsylvania District, does not appear, by the report of the case decided in the Supreme Court of New York, to have been cited at the bar, or referred to by the Court. The decision of the District Court of the United States, in the case of The Happy Return, has strong considerations in favor of its authority. It is the decision of an Admiralty Court on

[1] The Susan, 1 Pet. Ad. R. 165; The Philadelphia, ibid, 210; The Happy Return, ibid, 253. [2] Webb v. Duckingfield, 13 Johns. R. 390.

(a) The Test, 3 Hagg. R. 316.

a question growing out of the general maritime law, constituting peculiarly the professional learning of Admiralty Courts and their practisers.[1]

It was the ancient maritime custom to employ certain officers of ports, for the lading and unlading of vessels, called *sacquiers* and *arrameurs*. The following remarks, upon the eleventh article of the Laws of Oleron, furnish an account of them. "There were formerly, in several ports of Guienne, certain officers, called arrameurs or stowers, who were master carpenters by profession, and were paid
98 by the merchants, who loaded the ship. Their business was to dispose right, and stow closely, all goods in casks, bales, boxes, bundles, or otherwise; to balance both sides, to fill up the vacant spaces, and manage every thing to the best advantage. It was not but that the greatest part of the ship's crew understood this, as well as their stowers; but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also sacquiers, who were very ancient officers, as may be seen in the 14th book of the Theodosian Code, (*Unica de Saccariis Portûs Romæ*, Lib. 14.) Their business was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise."[2] At the present day there are, in our large cities, public officers called port-wardens, and persons, of the same occupation with the ancient sacquiers and arrameurs, called stevedores. It is not the custom in these cities to re-

[1] The Sisters, 5 Rob. R. 159. [2] 1 Pet. Ad. R. App. xxv.

tain seamen, at the end of a voyage, to unlade the cargo; for they are a class of men, solicitous, after the toils and perils of a voyage, to visit their friends and homes. 99 Their services, on such occasions, are considered of but little value, and their cooking fires greatly endanger the safety of vessels in crowded docks, and the valuable stores upon the wharves of our great cities. No instance is known, in which an entire forfeiture of wages has been enforced against a seaman, in the District Court of the United States for the District of Massachusetts, for a neglect to remain by, and unload, a vessel at the end of the voyage. But a deduction has been made from the wages of a mate, who quitted a vessel, at the end of a voyage, before the discharge of the cargo, and without being regularly discharged by the master or owners.[1] The law of England, in ordinary cases, requires the mariner, where the other party has done nothing to supersede the contract, to stay by the ship till the discharge of the cargo.[2]

It is a settled point of practice, in the District Court of the United States for the District of Massachusetts, that the ten days commence running from the day when the seaman is discharged, excluding the day of the discharge; and that on the eleventh day an Admiralty 100 suit *in rem*, or *in personam*, may be instituted for the recovery of the wages.[3]

The following clause, in the above section of the act of Congress, "if any dispute shall arise between the master

[1] Tunison's Case, 6 Mason R.

[2] The Cambridge, 2 Hagg. R. 246; The Baltic Merchant, Edw. R. 86.

[3] Holmes's Case, U. S. Dist. Ct., Mass., Dec. Term, 1823.

and seamen touching the said wages," is not, in the District Court of the United States for the District of Massachusetts, so construed as to authorize, in case of a dispute, a suit in the Admiralty before the expiration of the ten days; for otherwise it would always be in the power of the libellant, by making an exaggerated claim, to create a dispute, in order to accelerate the time of commencing the action, and thus the intention of the law would be defeated. That clause of the statute is considered either as a dead letter, which cannot be carried into effect without violating the spirit of the law, or as merely providing for a dispute respecting the wages, as well as for a neglect of payment, after the expiration of the ten days. It is also held in that Court, that a suit in Admiralty *in personam*, against the owner or master of a ship, by a seaman for the recovery of his wages, cannot be instituted until after the expira-
101 tion of the ten days. The rule of practice is the same in actions *in personam*, as in actions *in rem*. Suits *in personam* for seamen's wages are considered within the equity of the statute respecting proceedings against the ship. In the Court of Common Pleas, for the State of Massachusetts, a different doctrine has been maintained; and it was ruled, by a learned Judge of that Court, that, when the voyage was ended according to the terms of the contract, the wages were then due and payable, and might be sued for at Common Law, as in the case of ordinary contracts of service on land, where the hire is due as soon as the contract is fulfilled, unless there be a stipulated term of credit. Stress was also laid, by the Court, on the circumstance, that there was an actual dispute touching the wages; and it

was held, that in such a case an action at Common Law might be maintained before the expiration of the ten days.[1] (a)

Seamen, prosecuting for the recovery of their wages, are not, like plaintiffs in other civil causes of Admiralty and maritime jurisdiction, required in the District Court of the United States, for the District of Massachusetts and the Southern District of New York, to give security for costs. It is believed that this is generally the practice in the District Courts of the United States.

The costs in Admiralty Courts are entirely under the 102
control of the Court. Costs have been decreed in the District Court of the United States for the District of Massachusetts, where no debt was recovered, the libellant having been misled into commencing the suit by the misconduct of the other party.[2] In prize causes an acquittal of the property libelled is frequently decreed, with allowance of costs and expenses to the libellants.[3] In a hard case, where the Court was obliged to sustain upon strict legal principles a set-off against the claim of a mate for his wages, the amount

[1] Chaffin's Case, C. C. P., Essex, Sept. Term, 1825.

[2] Pettit's Case, U. S. Dist. Ct., Mass.

[3] The Imina, 3 Rob. R. 167; The Principe, Edw. R. 70; See 2 Wheat. R. App. p. 57.

(a) It has been decided in the U. S. District Court for the District of Massachusetts, that the act of Congress, 1790, ch. 56, § 6, which requires seamen to wait ten days after they are discharged before commencing a suit for their wages, applies only "to process *in rem* against the ship; and that any other mode of proceeding or remedy may be adopted without waiting until the ten days have expired."—Collins *v.* Nickerson, U. S. District Court, Boston, January, 1846.

of which exceeded the claim, a decree was made, in the District Court of the United States for the District of Massachusetts, that the claim for the wages and the costs should be allowed in full, and the set-off deducted from the amount of both debt and costs, by which a large portion of the costs was saved to the libellant.

It is not the practice of the District Court of the United States, for the District of Massachusetts, to decree costs against seamen who are unsuccessful in their suits, when there is probable cause for the commencement of the
103 action; for a decree for costs will in most cases subject the seaman to imprisonment, without being productive of any real advantage to the other party; and seamen are a peculiar class of men, specially under the protection of Admiralty Courts, and their constant services are important, in a national point of view, in peace and in war.

There is much strictness, in the doctrine of the Common Law Courts, in relation to the manner in which a tender should be made, and the production of the money, even when the offer of payment is rejected.[1] The strict doctrine of the Common Law is not recognised in the Admiralty Courts. A sincere offer of payment by a party, who has the means of making immediate payment, has often been ruled in the District Court of the United States, for the District of Massachusetts, to be a good tender; and the actual production of the money is not required, when the offer of payment is rejected. It has often been held in that Court, that, where a tender has been made in current bank bills, or a check on a bank, drawn by a merchant of established

[1] Dickinson v. Shee, 4 Esp. R. 67; Breed v. Hurd, 6 Pick. R. 356.

credit, it was a good tender unless specially objected
to; and where this kind of tender is specially objected 104
to, the party tendering is considered to be entitled to a
reasonable time to procure coin, where coin is specially required. A premature action, where a fair offer of settlement has been made, exposes the libellant to the loss of his costs, and, in some cases, to the payment of costs to the adverse party, and the proctor, if acquainted with the facts of the case, to the animadversion of the Court, for the impropriety of creating unnecessary litigation for the sake of costs. A party who does not accept a fair tender will not be allowed his costs.[1]

These points have generally been ruled in seamen's cases of small importance, and where the Court was fully convinced of the sincerity of the offer of payment, the ability to perform that offer immediately, and the unreasonableness of the refusal. In salvage cases, which are frequently of great importance, and where propositions of compromise are often ambiguously made, and often liable to misconception, the Admiralty Court, in England, disregards all tenders, except those formally made by acts of Court.[2] It is not known that this doctrine has been adopted in the Courts of
the United States; but the general practice is, in sal- 105
vage cases, to make tenders by formal acts of Court,
which are legal memoranda of the nature of pleas.

Salvors are not entitled to costs upon a sufficient tender,

[1] The Frederic, 1 Hagg. R. 218.

[2] Abbott on Ship., Pt. 3, c. 10, § 2, p. 403; The Vrow Margaretta, 4 Rob. R. 103; The John and Thomas, 1 Hagg. R. 157.

unless it be accepted.[1] A tender, in a salvage case, not accepted in due time, may be reduced by the Court.[2]

In the High Court of Admiralty in England, an opinion has been expressed, that negotiations for an adjustment of a suit should be conducted in the presence of the proctors of the parties, as they have a personal and legal weight, and a direct responsibility to the Court.[3] The costs of a battle between the practisers in a suit in that Court have been cast upon a proctor, whose uncandid representation respecting a negotiation occasioned the expense.[4]

It is the duty of the practisers in the Admiralty, in all cases, and particularly in seamen's causes, founded on claims for personal injuries, and where there is danger of their being misled by the inflamed representations of their clients, before commencing suits, to ascertain that there are
106 reasonable grounds; for, as has been observed by Lord Stowell, they have a public, as well as a private, duty to perform, and owe something to a fair administration of justice, as well as to their employers. The interests propounded ought in their apprehension to be just, and any endeavour to stifle the fair and true circumstances of cases, or to impose false cases on the Court, is making themselves instruments and parties to frauds.[5]

This obligation to proceed with fairness and caution is peculiarly strong in the cases of seamen, who are generally irresponsible for costs, and against whom, for that reason, costs are not usually decreed in Courts of Admiralty,[6] except in suits manifestly vexatious. But where seamen's causes are

[1] The Vrow Margaretta, 4 Rob. R. 106; The John & Thomas, 1 Hagg. R. 157. [2] The General Palmer, 2 Hagg, R. 180.

[3] The Frederic, 1 Hagg. R. 220. [4] Ibid, 225. [5] Ibid, 220. [6] Ibid.

well grounded, counsel should never shrink from a faithful discharge of professional duty to their clients, on account of the wealth and power of their opponents. In the High Court of Admiralty, in England, seamen's causes are advocated by most distinguished members of the profession; and in that Court, and in the Admiralty tribunals of the United States, are heard and examined with the most patient and respectful attention. In seamen's causes, particularly 107
for wages, the younger members of the profession may often obtain opportunities of displaying ability and learning in Courts, where reputation is gratifying to professional ambition, and highly estimated by the community.

According to the present organization of the Courts of the United States, the Courts having Admiralty jurisdiction, original and appellate, are the District, the Circuit, and the Supreme Courts of the United States. The District Courts have exclusive original cognizance of civil causes of Admiralty and maritime jurisdiction; and, at the establishment of the District Courts, the jurisdiction in Admiralty causes was final, where the matter in dispute did not exceed, exclusive of costs, the sum or value of three hundred dollars.[1] Appeals may now be made from all final decrees of the District Court, in Admiralty cases, to the Circuit Court, next to be holden for the District, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars.[2] Such appeals are tried in the Circuit Court, by one of the Justices of the Supreme Court of the United States, sitting as a Circuit Judge. A still further appeal, in Admiralty 108
cases, is allowed from the final decrees of the Circuit

[1] Act of Cong. 1789, ch. 20, § 21. [2] Act of Cong. 1803, ch. 93, § 2.

Court to the Supreme Court of the United States, where the matter in dispute exceeds, exclusive of costs, the sum or value of two thousand dollars.[1]

The Judges of the respective District Courts are required to hold, in their respective Districts, four stated terms at times and places established by law; and they are authorized to hold Special Courts at their discretion, at such places in their respective Districts as the nature of the business and the discretion of the Judge shall direct.[2] The provision for Special District Courts is intended, by the Legislature, for the purpose of enabling the District Courts of the United States to administer justice speedily, *levato velo*, in cases of Admiralty and maritime jurisdiction; and, it is the practice in those Districts where Admiralty causes frequently arise, for the Judges to hold Special Courts often, in order that the great privilege of freemen may be enjoyed,—a right to justice without delay, a right inestimable in maritime cases, where, from the character of the causes and the parties, a delay of justice would often be as injurious as a denial.

109 The Admiralty Courts are in time of war military courts; and a liberal, honorable, and courteous practice is expected from the practisers in them, and all vexatious, quibbling, and sharp proceedings are discountenanced. The doctrine of the Civil Law is as follows; "As advocates are to represent their clients without their passions, so they ought to employ, in the defence of the most just causes, nothing else but justice and truth, and to abstain, not only from advancing untruths in matters of fact, from all disingenuity, from all manner of surprise in their reasonings, and from all

[1] Act of Cong. 1803, ch, 93, § 2. [2] Act of Cong. 1789, ch. 20, § 3.

other unfair practices; but, likewise, from giving ill language, from transports of passion, and from every thing which may be inconsistent, not only with justice, but even with the decorum and respect that is due to the seat of judgment."[1]

The counsellors, advocates, and proctors of the Courts of Admiralty, in France, were required to be men of education, who had served a regular term of study with officers of the Court, and who had attained the age of twenty-five years.[2]

In this chapter a statement of the general rules of practice of Admiralty Courts, in civil causes, has been 110 made. There are, however, many particular points of practice, which will be stated under the different heads that will be hereafter considered.

[1] 2 Domat. Civ. Law, &c., Public Law, B. II, Tit. 6, § 2, p. 593.
[2] Valin, Comment. sur l'Ordon. de la Mar. 7. 125. (Ed. 1829.)

The master, although the original hypothecator of the ship, and a part owner, is not precluded by the practice of the Court of Admiralty from joining the other owners in impugning a bottomry bond.—The Prince of Saxe-Cobourg, 3 Moore's Appeal Cases, 1.

Where the libellant *in rem* establishes a clear legal right to condemnation and sale, the Court cannot refuse or postpone the order of sale.—Davis *v.* A New Brig, Gilpin R. 488.

111 CHAPTER III.

THE LIBEL.

THE libel is the first proceeding in a suit in Admiralty, in the Courts of the United States.[1] In the Admiralty Court in England, the libel is not filed until after the citation, or the arrest of the defendant, and his appearance, and not until the fidejussory security, or caution, has been given by the respondent. Then the proctor for the plaintiff presents the libel, and, according to the ancient book of practice, says, "*Do libellum, et peto decerni procedendum fore summariè ac de plano.*"[2] The ancient formula of the Court of Admiralty in England, in instituting a suit for collision, is by arrest of the ship, her tackle, apparel, and furniture, against which the suit is brought.[3]

The word *libel* is derived from the Latin word *liber*, and, in Admiralty practice, signifies the written statement, by a plaintiff, of his cause of action, and of the relief which
112 he seeks to obtain in a suit.[4] It is also defined to be a declaration or charge drawn up in writing on the part of the plaintiff, to which the defendant is obliged to answer.[5]

The libel should be narrative, specious, clear, direct, certain, not general nor alternative.[6] It should be composed in

[1] Rules in Adm. U. S. Dist. Ct., N. York, S. Dist.; Jenks *v.* Lewis, 3 Mason R. 504. [2] Clerke's Prax. Tit. 19. [3] The Dundee, 1 Hagg. R. 109.
[4] Law's Eccl. Law, 147. [5] 2 Burns' Eccl. Law, 406.
[6] Law's Eccl. Law, 147.

a good style, which, as has been remarked by a celebrated British classic, consists in "proper words in proper places."[1]

The form of the libel is varied, according to the customs of different Courts. There are five substantial requisites which it should contain.

1. The name, and description or addition, of the plaintiff.
2. The name, and description or addition, of the defendant.
3. The name of the Judge, with a respectful designation of his office and Court.
4. The thing or relief, general or special, which is demanded in the suit.
5. The grounds upon which the suit is founded.

> "Quis, quid, coram quo, quo jure petatur, et a quo,
> Rectè compositus quique libellus habet."[2]

The object of the libel is to propound the cause of 113
action, and the relief which is sought, so as to instruct the adversary and the Judge in relation to the grounds and nature of the suit. It should, therefore, be conformable to the truth, and so framed as to correspond with the evidence; for the Admiralty Courts, like the Courts of Common Law, proceed *secundum allegata et probata*, and the proof must correspond with the allegations in the libel, and judgment be rendered or a decree pronounced accordingly.[3]

The libel of the Civil Law corresponds with the declaration in the pleading of the Common Law.[4] The principles of the Common Law, relating to the structure of declarations, are in most respects important lights in framing the statement

[1] Swift's Advice to a Young Clergyman.
[2] Law's Eccl. Law, 149; Hall's Ad. Prac. 125.
[3] Law's Eccl. Law, 150; Hall's Ad. Prac. 126; The Hoppett, 7 Cranch R. 394. [4] Co. Lit., 17 a.

of a cause of action in a libel in the Admiralty Courts in the United States, where most of the Judges and practisers are Common Law lawyers. A summary of those principles is thus laid down in a work of general use in the United States: "The declaration must allege all the circumstances necessary for the support of the action, and contain a full,
114 regular, and methodical statement of the injury which the plaintiff has sustained, with the time and place and other circumstances, with such precision, certainty, and clearness, that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; that there may be a complete finding of the issue, and that the Court, consistently with the rules of law, may give a certain and distinct judgment."[1]

The form of a libel is either simple or articulate. The simple form is when the cause of action is stated in a continuous narration. It is usually adopted when the cause of action can be briefly set forth. The articulate form is when the cause of action is stated in distinct allegations, or articles. This is usually adopted when numerous statements are required to be distinctly made.[2] And the true course, even in a summary petition, and *à fortiori* in formal proceedings, is to allege the material facts in distinct articles in the libel, with as much exactness and attention to times and circumstances as in a declaration at Common Law.[3] It is a common practice to make each count in a libel a
115 distinct article, and to set forth the first allegation in

[1] Chitty on Plead. 285, (6th Am. from the 5th Lond. Ed.)

[2] Law's Eccl. Law, 148; Hall's Ad. Prac. 123; The Hoppett, 7 Cranch R. 394. [3] Orne *v.* Townsend, 4 Mason R. 541.

each count as an *imprimis* averment, and the subsequent allegations in each count as distinct *items*. This will be found a convenient arrangement of the composition, particularly where there are several counts in the libel. (*a*)

A libel of information, to enforce a forfeiture for a violation of the laws of the United States, is subject to the same general rules that are applicable to libels in other instance causes in the Court of Admiralty. Certainty to a certain intent, in general, is requisite in indictments, informations, and declarations at Common Law.[1] This sort of certainty is defined to be that, which, on a fair and reasonable construction, may be considered certain, without recurring to possible facts which do not appear.[2] This, in all matters of substance, is requisite in a libel of information in the Admiralty. But the mere technical niceties of the Common Law, in matters of form, have not been transplanted into the Admiralty Courts; and a doubt has been expressed, by a very learned Judge of the Supreme Court of the United States, whether the rigid principles of the Common Law, respecting the framing of Exchequer informations, have been adopted in 116
the Courts of the United States, in relation to an information founded on a seizure on land for a forfeiture, which case is triable according to the course of the Common Law.[3]

[1] 1 Chitty on Plead. 268, 285, (6th Am. from the 5th Lond. Ed.) [2] Ibid.
[3] Cross *v.* U. States, 1 Gall. R. 31; The Samuel, 1 Wheat. R. 15; The Hoppett, 7 Cranch R. 389; The Emily & Caroline, 9 Wheat. R. 386; The Merino, ibid. 391.

(*a*) See Rules 22, 23, New Rules of the Supreme Court. Vide Appendix. In a libel for a marine tort, the libellant must set forth in a distinct allegation, each separate and distinct wrong on which he intends to rely, and for which he claims damages.—Pettingill *v.* Dinsmore, Daveis R. 208.

A libel of information in the Admiralty should contain a clear and full statement of the facts constituting the case of forfeiture, and a reference to the statute or statutes on which the proceedings are grounded. There should be such a substantial statement of the offence, that the adverse party, claiming, may know to what accusation he is to direct his defence, and that the Court may see with judicial eyes, that the facts are within the law; for this is essential to the administration of justice in all cases. But mere technical niceties of the Common Law, sustained only by precedents, are not engrafted on the Admiralty practice. It is sufficient if the offence be described in the words of the law, and be so described that, if the allegations be true, it must be within the statute.[1] But when the words, which describe the subject of the law, are general, embracing a whole class
117 of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, the charge in the libel ought to conform to the true sense and meaning of the words, as used by the Legislature; and following the words of the statute, in such a case, is not sufficient.[2]

In a libel of information, it is not necessary to state facts constituting the defence, or the grounds of exception of the operation of the law on which the proceeding is founded. This is in conformity to the rules of the Common Law respecting indictments and informations. These are as follow. First: Where the exception is in the description of the of-

[1] Cross *v.* U. States, 1 Gall. R. 31; The Samuel, 1 Wheat. R. 15; The Hoppett, 7 Cranch R. 389; The Emily & Caroline, 9 Wheat. R. 386; The Merino, ibid, 391.

[2] The Mary Ann, 8 Wheat. R. 389; Rex *v.* Jarvis, 1 Burr. R. 154.

[3] The Aurora, 7 Cranch R. 389.

fence in the enacting clause, there must be an averment, that the case is not embraced in the exception.[1] Second: Where the exception is in a distinct clause or proviso, it is a matter of defence not necessary to be anticipated and precluded by negative averments on the part of the prosecution; but it should be averred and established on the other 118 side.[2] The technical conclusion, *contra formam statuti* or *statutorum*, so necessary in Common Law indictments and informations upon statutes, is in Admiralty informations considered altogether formal and unnecessary; a substantial reference to the law, on which the prosecution is founded, being considered sufficient for the purposes of justice.[3] But the safer course is to follow the tried and beaten path of the Common Law, and to conclude a libel of information with the allegation, that the facts set forth are against the peace and dignity of the United States, and the form of the statutes or statute, the violation of which has occasioned the forfeiture. (*a*)

Much technical nicety exists in Common Law informa-

[1] 1 Chitty on Crim. Law, 232, 284; 2 id., 109, *note* (*u*); Rex *v.* Jarvis, 1 Burr. R. 154; 1 East's P. C. 166; Commonwealth *v.* Maxwell, 2 Pick. R. 141; Spieres *v.* Parker, 1 T. R. 145; Gill *v.* Scrivens, 7 T. R. 31; Jones *v.* Axen, 1 Ld. Raym. 120; Am. Jurist, Vol. VIII, p. 233; Savell R. 32; U. States *v.* Hayward, 2 Gall. R. 485, 497, 499.

[2] 1 Chitty on Crim. Law, 283; 3 id., 678, *note* (*f*); Rex *v.* Pemberton, 2 Burr. R. 1035; Rex *v.* Baxter, 5 T. R. 83; S. C., 2 Leach's Crown Law, 660; 2 Hawkins's P. C., B. 2, c. 25, § 113–117; King *v.* Pollard et al., 2 Ld. Raym. 1370; and cases cited in the last note.

[3] The Merino, 9 Wheat. R. 401.

(*a*) Rule 22, New Rules of the Supreme Court. See Appendix.

tions, relative to a conclusion in the singular or plural.[1] The rules on this subject are as follow. First: When an offence is created by a single statute, the conclusion
119 should be against the form of the statute. Second: Where the offence is prohibited by several independent statutes, a conclusion in the singular will suffice, and the indictment or information will be considered to refer to that enactment which is most for the public benefit.[2] Third: Where one statute creates the offence, and another creates the penalty, the conclusion should be in the plural, in order that both statutes may be brought into view; but it has been holden that this is not requisite.[3] Fourth: When the offence is founded on a single statute, and the conclusion is in the plural, although the allegation be too extensive, it is not erroneous.[4] Fifth: Where an offence is prohibited by each of two statutes; where the statute, on which the proceeding is founded, is explained by another, or regulated in its operation, or made perpetual, or revived, or adopted and continued, or continued in part, a conclusion in the singular will be proper.[5] But Lord Hale considers it safer to conclude in the plural, when a statute, which has expired, has
120 been revived by another.[6] If there be more than one statute concerning the same offence, and the first was never discontinued, and the latter only continued the former without making any addition to it, or only qualified the

[1] 1 Chitty on Crim. Law, 290; Sears *v.* U. States, 1 Gall. R. 257.

[2] 1 Chitty on Crim. Law, 291.

[3] Ibid; Kenrick *v.* U. States, 1 Gall. R. 271; Com. Dig. Indictment G. *note* 9.

[4] Kenrick *v.* U. States, 1 Gall. R. 271; U. States *v.* Gibert et al., 6 Mason R.

[5] Com. Dig. Indictment G, *note* 9. [6] 2 Hale's P. C., 173.

method of proceeding upon it, without altering the substance of its purview; it is safe to conclude in the singular, and it has been holden, that a conclusion in the plural will be erroneous.[1]

A libel of information, for a statute forfeiture, should substantially agree with the statute, otherwise it will be erroneous.[2] When founded on a seizure cognizable in the Admiralty, it should contain an express allegation that the seizure was made on the high sea, or on waters navigable from the sea by vessels of ten or more tons burthen. (*a*) In the Admiralty practice of the District Court of the United States for the District of Massachusetts, the libel of information for a seizure contains an allegation, that the seizure was made by the Collector of the port, by whom, or by whose officer, it was in fact made. In the District Court of the United States for the Southern District 121 of New York, the libels of information, in cases of seizures made by any of the revenue officers of the port of New York, allege them to have been made by the Surveyor of that port.

The conclusion of a libel is a matter of importance, and should contain a prayer, or petition, for the specific relief desired, for general relief, as is usual in bills in Chancery, and for general or particular process as may be required.[3]

In the conclusion of a libel *in personam*, when the value of the matter in dispute does not appear and cannot be

[1] 2 Hawkins P. C., B. 2, c. 25, § 117.
[2] The Betsey, 1 Mason R. 354. [3] Law's Eccl. Law, 149.

(*a*) See New Rules of the U. S. Supreme Court, 22.

shown by affidavits, as in cases of personal torts, damages must be laid in some certain sum, otherwise, in the District Court, no more than fifty dollars can be recovered, and no appeal can be sustained;[1] and to carry such a cause by appeal to the Supreme Court of the United States, damages must be claimed in an amount exceeding two thousand dollars.

It is frequently the case, that the answer of the defendant on oath to the libel is sought for in the prayer of relief, 122 which the libellant has a right to require.[2] The printed forms of the libels in common use, which are to be found in the Appendix to Hall's Admiralty Practice, contain prayers, that the defendant may be required to answer the libel on oath.[3] This practice is incorrect and unsafe, unless, in the opinion of the libellant or his proctor, it may be necessary to make an appeal to the conscience of the respondent, in order to substantiate the case; for, the answer being required to be on oath, and being so made, would, probably, in order to be disproved, require two witnesses, or one witness with strong corroborating circumstances, as is the case with an answer in Chancery.[4]

It has been held, in the District Court of the United States for the District of South Carolina, that, to countervail the oath of the defendant in support of his answer, required by the plaintiff, there must be the evidence of two witnesses.[5] This is understood to be the law in the practice of the District Courts of the United States in Massachusetts and

[1] Jenks *v.* Lewis, 3 Mason R. 503. [2] The Rambler, Bee. Ad. R. 9.
[3] Hall's Ad. Prac. 132. [4] Hughes *v.* Blake, 1 Mason R. 515.
[5] The Rambler, Bee. Ad. R. 9.

Maine, and, as is believed, in all the Districts in the First Circuit. But the answer must be responsive to 123 the libel or interrogatories, in order to be thus rendered evidence for the respondent, as is the established rule in Chancery on this subject.

There is, however, a very high authority bearing on this subject, that of the Chief Justice of the Supreme Court of the United States, who is reported to have ruled, that, where the complainant calls upon the defendant, as in Chancery, to purge his conscience and disclose facts, by this appeal the answer is made evidence; but, in common Admiralty cases, where no such demand or appeal is made, and where the answer asserts a right affirmatively in opposition to the complainant's demand, it is not evidence.[1] Generally, no possible advantage can result, but serious disadvantages may be the consequence of requiring, in the libel, the answer on oath of the defendant; for it is the settled practice, certainly in the District Court of the United States for the District of Massachusetts, for either party, at any subsequent period in the cause, to propound interrogatories to the adverse party, to be answered upon oath, when it may be deemed necessary by either party to appeal to the conscience of his adversary for a discovery of the truth.

By the rules of the Circuit Court of the United States 124 for the First Circuit, and by the rules of the District Court of the United States for the Southern District of New York, the plaintiff has a right, in suits of Admiralty and maritime jurisdiction, to require the personal answer of the

[1] The Matilda, Hall's Law Journal, Vol. IV, p. 488.

defendant on oath to interrogatories (*a*) to be filed by him, touching the allegations contained in the libel, or any matter or thing by him suggested and filed which shall be relevant to the suit; and the defendant has a right to require the personal answer of the plaintiff, on oath, to interrogatories filed touching any matter of defence, or exception, or any other allegation by him filed, which shall be relevant to the suit. But either party may object to answering any interrogatory, the answer to which will expose him to a penalty, forfeiture, or punishment for a crime. Upon refusal or neglect to answer interrogatories, a party is deemed to be in contumacy and default. If the party be plaintiff, the suit will be dismissed; if defendant, the claim or answer will be treated as a nullity and default entered.[1] (*b*) By the Admi-
ralty rules of the Circuit Court of the United States for
125 the First Circuit, if the other party prefer it, he may
proceed by attachment to compel an answer.[2]

Interrogatories are sometimes annexed to the libel, and sometimes propounded at some subsequent stage of the cause.[3] When the interrogatories are annexed to the libel, there is usually embodied in it a special prayer, that the defendant may be required to answer the libel, and the interrogatories annexed and propounded.

The same observation may be made in reference to requiring the defendant to answer on oath interrogato-

[1] First Circuit Rules 18, 19.

[2] Rule 20; Clerke's Prax. Tit. 24.

[3] Hall's Ad. Prac. 132.

(*a*) See New Rules of the U. S. Supreme Court, 23, 31, 32.

(*b*) N. Y. D. C. Rules 99, 100, 170.

ries, either annexed to the libel or distinctly and separately propounded, that has been made respecting requiring an answer on oath to the libel. It is a hazardous practice, for it renders the defendant's answers to the interrogatories evidence, which must be disproved by two witnesses, or one witness corroborated by very strong circumstances. The interrogatories, therefore, should never be resorted to where the case can possibly be made out without such an appeal to the conscience of the adverse party. (*a*)

When interrogatories are propounded, the greatest skill and caution are requisite in the party propounding 126 them. It is a remark, justified by constant experience in the Ecclesiastical Courts, whence this inquisitorial mode of practice has been derived, that they often are the occasion of great injury to the party propounding, and of great benefit to the party to whom they are propounded.[1]

In the Admiralty Courts of the United States, although it is usual, it is not generally understood to be necessary, that the libel should, in the first instance, be supported by the oath of the libellant. This, however, depends upon the rules of the different Courts. In the District of Massachusetts, libels are usually signed by the libellant or his proctor, without being sworn to, unless a process of arrest of person or property be prayed for. It is one of the rules in Admiralty of the Circuit Court of the United States for the First Circuit, that no warrant of arrest, either of person or property, in cases exceeding five hundred dollars in amount, shall issue unless

[1] Law's Eccl. Law, 225; 2 Bro. Civ. and Ad. Law, 371, *note* (38.)

(*a*) See note, Chap. X, marg. page 284.

an affidavit of the debt be previously made by the person in whose behalf such warrant is prayed, or by his lawful
127 attorney.[1] By the rules in Admiralty of the District Court of the United States for the Southern District of New York, all libels, except in behalf of the United States, must be supported by oath, and no process requiring an answer can issue until the libel shall have been filed.[2] It seems also to be understood, as a matter of practice in the Supreme Court of the United States, that a Judge's order is necessary when an arrest is required.[3] By the rules in Admiralty in the District Court of the United States for the Southern District of New York, no process *in personam*, for the arrest of any person in cases of torts or unliquidated damages, shall issue except upon the mandate of the Judge. But, in cases of liquidated damages, when the certainty and amount of the demand appear upon the face of the libel, the process may be issued by the clerk without an order; such process shall then plainly express the cause of action, and the amount of the demand; and the clerk shall endorse thereon the sum for which bail is required, being the sum sworn to, and a further sum, not exceeding one half such amount, added thereto; and every party arrested, deem-
128 ing himself aggrieved thereby, may have a hearing before the Judge, on giving four days notice thereof, for the purpose of being discharged from arrest, or of having the amount in which he is held to bail reduced. (*a*) In the

[1] Rule 2. [2] Rules 2, 3. [3] Manro *v.* Almeida, 10 Wheat. 496.

(*a*) Rules altered; see Appendix, Rules 16, 17, 21, 40. See New Rules of the U. S. Supreme Court, 3, 6, 7.

District Court of the United States for the District of Massachusetts, no process for the arrest either of person or property issues, unless by a mandate of the Judge upon a libel which has been sworn to, except in cases of small amount, where an arrest of the person, or holding to bail in a sum not exceeding one hundred dollars, is required. In such cases the clerk may issue a process of arrest to the amount of one hundred dollars, returnable at the next Court day, when the libel is sworn to and filed in his office.

As by the general rules of Admiralty practice the oath of either party may be required at any stage of the cause in support of his pleadings, in this respect there is an advantage, in the flexible and extensive practice of the Admiralty Court, over that of the Chancery; for, in the latter Court, the defendant cannot require the oath of the plaintiff, except by means of a cross bill and action.[1]

Petitions, in the nature of libels, are usual in the 129
course of an Admiralty cause, in the Courts of the United States, for the purpose of adding parties, subtracting them, obtaining leave to make amendments, a distribution of proceeds in the Registry, decrees of sale, and all incidental purposes connected with the suit. These petitions are made with more or less form, according to the nature of the circumstances which render them necessary or proper.

A petition for salvage has been allowed, where the petitioner had, from ignorance, permitted a claim by others for salvage to be preferred and decided upon before he made

[1] 2 Bro. Civ. and Ad. Law, 416; Clerke's Prax. Tit. 24.

his application, and a compensation decreed to be paid out of the proceeds remaining in Court.[1] (a)

In the Admiralty Courts of the United States, a libel is often filed in the office of the Clerk of the District Court, and the common process of monition or summons issued to the adverse party, requiring his appearance at a future day, usually the next Court day.[2]

The practice of filing libels out of Court in the clerk's office has existed, for a great length of time, in many
130 Districts, and, in the case of a libel by seamen for the recovery of their wages, appears to be justified by the provisions of the act of Congress giving to seamen a right to Admiralty process in such cases. But in strict practice, it would seem that the libel should be filed in Court at a regular term, or at a Special Court, which the Judge of the District Court of the United States is authorized to hold at any time or place within his District.[3] This authority is evidently given by Congress to the District Judges, for the purpose of enabling the Admiralty Courts to permit an entry in Court of a libel at any time, and to administer justice promptly in maritime causes. The safer course, in a cause of importance, is to file the libel and enter the action in Court; and, in an Admiralty cause, in behalf of the United States, to enforce a forfeiture, it would be hazardous to adopt any other course, for the act of Congress relative to the trial

[1] The Cato, Bee. Ad. R. 241. [2] Hall's Ad. Prac. 9, *note*.
[3] Act of Congress, 1789, ch. 20, § 3.

(a) When different libels are filed by co-salvors unnecessarily, it is at the peril of paying costs.—The Henry Ewbank 1 Sumner, R. 400.

of property seized as forfeited, declares, that it shall be "libelled and prosecuted" in the "proper Court having cognizance thereof."[1] The practice, now adopted in the District of Massachusetts, and, as it is believed, in the South-
ern District of New York, is to file and enter the libels 131
in the Admiralty causes, wherein the United States are plaintiffs, at a regular term of the District Court, or at some Special Court, by which the whole proceedings are always a matter of record; and the usual allegation in Admiralty, as well as Common Law informations, that the Attorney of the United States appears "in Court" and presents the information, is in conformity with the truth.

In the District of Massachusetts, the regular term of the District Court is protracted by adjournments, until near the time of the commencement of the succeeding term. Usually once in a week there is a regular term day of the Court, which is holden in the City of Boston, where are the sessions of all the Courts of the United States for the District of Massachusetts. This arrangement, in a great commercial District, has been found productive of very considerable convenience to the Government, the citizens, and the practisers in the Court. In almost all cases of importance this practice enables suitors to enter their actions and file their libels in Court at a regular term, and, in a great measure, it supersedes the necessity of holding Special District Courts.

[1] Act of Congress, 1799, ch. 128, § 89.

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CHAPTER IV.

THE PROCESS.

THE libel having been duly filed, the next step is the process which issues thereupon. The Admiralty Courts have generally the power, and especially under the provisions of the acts of Congress, directing that their proceedings shall be according to the course of the Civil Law and Admiralty Courts, to form and issue any process which may be requisite to attain justice, and afford ample and complete redress to the parties in the suit.

The common processes of the Courts of Admiralty are the monition, the warrant of arrest, the writ of attachment of the defendant's property, in his possession or in the possession of others, and also of the debts due from others to him.

The monition is the common Admiralty citation or summons, and is either general, special, or mixed.

The general monition is a citation or summons to all persons interested, or, as is commonly said, to the whole world,
133 to appear and show cause why the libel should not be sustained, and the prayer of relief granted. This is adopted in prize causes, Admiralty suits for forfeitures, and other suits *in rem*, where no particular individuals are summoned to answer. In such cases the taking possession of the property libelled, and this general citation or monition, served in the manner directed by the rules and practice of the Court, are considered constructive notice to the world of the pen-

dency of the suit; and the judgment of the Court, which may be rendered, cannot be excepted to, upon the ground of a want of notice to parties interested, and is conclusive upon the title to the property which may be affected. As soon as the process is commenced, and the arrest of the property made, it is considered in the custody of the law; for it is a general rule, in all Admiralty proceedings *in rem*, that the custody of the thing in controversy belongs to the Court in which the suit is pending.[1]

The monition is a warrant of the Court, directed, in the United States, to the Marshal or his Deputy, commanding him, in the name of the President of the United States, to give public notice, by advertisements in such news- 134 papers as the Court may select, and by notifications, to be posted in public places, that a libel has been filed in a certain Admiralty cause pending, and of the time and place appointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The monition is served in the manner directed in the warrant.

When ships or vessels, goods, wares, or merchandise, are seized, libelled, and prosecuted, fourteen days notice is to be given of the seizure and libel, by causing the substance of the libel, with the order of the Court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and also by posting up the same in the most public manner, for the space of fourteen days, at or near the place of trial.[2]

By the rules[3] of the Circuit Court of the United States for

[1] Burke *v.* Trevitt, 1 Mason R. 100.

[2] Act of Cong. 1799, c. 128, § 89. [3] Rule 13.

the First Circuit in civil causes of Admiralty and maritime jurisdiction, in all cases of seizures and proceedings *in rem* (unless where any statute otherwise directs), the warrant of arrest should be served by arrest of the property, and
135 causing the substance of such warrant to be printed in some newspaper, published near the place of seizure, and also by posting up the same in the most public manner, at or near the place of trial, for the space of fourteen days before the return day, unless a shorter time shall be directed by the Court.

A special monition is a similar warrant, directed to the Marshal or his Deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. This is served by a delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but personal service should be made, if possible.[1]

Sometimes the monition is of a mixed character, and contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warrant. This is usually served by newspaper advertisements, by notifications posted in public places, and by the delivery of a copy attested by the officer to each person specially named, or by leaving it at his usual place
136 of residence.

The warrant of arrest, or attachment, is either *in rem*, or *in personam*, or a mixed process directing the Marshal, or his Deputy, to attach and take into custody the

[1] Clerke's Prax. Tit. 21.

thing libelled, and also to arrest the person who is held to bail, or to summon him to answer in the suit. The warrant of attachment *in rem* directs the Marshal, or his Deputy, to take into custody the property libelled, and to hold it subject to be disposed of according to the decree of the Court. The warrant of arrest *in personam* is directed in the same manner, and requires the Marshal, or his Deputy, to arrest the defendant, and to hold him to bail, in a sum named in the warrant, for his appearance before the Court, at the time and place fixed for the trial, and, for want thereof, to commit him to the common jail. When the defendant is arrested, the officer should inform him of the cause of the arrest and exhibit the warrant to him.[1] The officer should also, when requested, furnish the defendant with a copy of the process; and he is entitled to receive his legal fees for such copy.[2] In the Admiralty Court in England the sum in which the defendant is to be holden to bail is marked in the margin of the warrant; thus, "Action for £500." In the war-
rant of arrest, in common use in the District Courts of 137
the United States for the District of Massachusetts, the Marshal or his Deputy is commanded to arrest the defendant and hold him to bail in the sum specified in the body of the warrant. The security being taken, the warrant and the bond should be transmitted to the Court, and deposited with the clerk, together with a return, indorsed upon the warrant, of the doings of the officer who executed the process, with the time and place of executing it, and signed by the officer with his Christian name and surname.[3] In the Admiralty

[1] Clerke's Prax. Tit. 3. [2] Hall's Ad. Prac. 10.
[3] Clerke's Prax. Tit. 4.

Court in England, if the warrant has been executed by a Marshal or Deputy Marshal of the Court, he is accustomed to file his affidavit of the execution of the process. But if the warrant has been executed out of London or its suburbs, a certificate sealed with an authentic seal of the due execution of the process is sufficient.[1]

Frequently a process of attachment of property and a general and also special monition are blended in the same warrant; and, with the attachment of property, is always united either a general or special monition.

138 The writ of attachment, for the purpose of obtaining security for the payment of a debt, is also directed in the same manner, and, in the District of Massachusetts, the Marshal or his Deputy is required to attach the goods or estate of the defendant, according to the State practice, in which the attachment system exists. In this writ is contained a special monition to the defendant. The process of the Admiralty Court in England does not run against lands.[2] But, in the District of Massachusetts, by the original writ of attachment, lands may be attached.[3] The writ of execution runs, like the Common Law writ of execution in Massachusetts, against the moneys, goods, lands, and person of the judgment debtor, and it is supposed that the execution would be levied according to the State practice. But no instance is known in which it has been found necessary to levy an Admiralty execution upon lands in this State. The common stipulation, according to the rules of the

[1] Clerke's Prax. Tit. 6.

[2] 2 Bro. Civ. and Ad. Law, 410, 412; Hall's Ad. Prac., 31, *note*.

[3] Stone's Cases, U. S. Dist. Court, Mass., June Term, 1826.

Circuit Court of the United States for the First Circuit,[1] contains an express consent on the part of the respec-
tive stipulators that execution shall issue against their 139
lands. The same provision is contained in the Admi-
ralty stipulation in use in the District Court of the United States for the Southern District of New York, and it is in conformity with the rules of that Court in Admiralty causes.[2]

The writ of foreign attachment, or the garnishment process, is also directed in like manner; and it requires the Marshal or his Deputy to attach the defendant's goods or estate in his own hands or possession, and also his goods, effects, or credits in the hands or possession of others named in the writ as trustees, and who are summoned, together with the defendant, to appear and answer to the suit. This writ is served upon the defendant and the alleged trustees, by delivering to them attested copies of the process, or by leaving such copies at their usual places of residence, and it will issue against the debts of an absent person to make him a party to the suit.[3]

The writs of attachment and foreign attachment, for the purpose of obtaining security for a debt, do not issue
until after a return by the Marshal or his Deputy, 140
upon a warrant of arrest *in personam*, that the de-
fendant cannot be found. Herein there is a difference between the Admiralty practice of the District of Massachusetts, and the Common Law practice in the Circuit and District Courts of the United States for the District of Massachusetts and in the State Courts; for, in the Common Law

[1] Rule 3. [2] Rule 59.

[3] Manro *v.* Almeida, 10 Wheat. R. 473; Bouysson et al. *v.* Miller et al., Bee. Ad. R. 186.

practice of all these Courts, the original writ may be served by an arrest of the person or an attachment of the property of the defendant, or the original writ may be a process of attachment and foreign attachment united.

By the general rules of Admiralty practice, when the defendant has secreted himself, or departed from the country, and cannot be arrested, a warrant may be obtained to attach the defendant's goods in his own hands or in the hands of others, and also debts due from others to the defendant; and the form of the warrant is to attach the goods, debts, or sums of money belonging to the defendant and being in the hands of a person named.[1] By the rules of the Circuit Court of the United States for the First Circuit, in civil causes of Admiralty and maritime jurisdiction, and
141 also by the rules[2] (*a*) of the District Court of the United States for the Southern District of New York, in Admiralty and maritime suits, it is provided, that, if a party against whom a warrant of arrest issues cannot be found, and return thereof be made, the plaintiff may have a warrant to attach the property of the defendant, and at his option may have inserted therein a clause of foreign attachment according to the course of the Admiralty.

These are the ordinary primary processes in use in the Admiralty Courts, to compel the appearance of the defendant, or to secure the possession of property which is sought to be rendered subject to the decree and disposition of the

[1] Clerke's Prax. Tit. 28, 32. [2] Rule 25.

(*a*) See App. New Rules U. S. Supreme Ct., Rule 2.

Court, or to obtain the satisfaction of a debt recoverable in the Admiralty.

Monition issues, as a matter of course, on motion in term time, or from the office of the clerk in vacation. Arrests of person or property require the fiat of the Judge.[1]

There is undoubtedly considerable difference of practice in these proceedings in the various Circuit and District Courts, whose practice is everywhere, in a great degree, assimilated to the practice of the various State Courts, where the District Courts are established. One of the rules[2] in Admiralty of the Circuit Court for the First 142 Circuit requires, that no warrant of arrest of person or property shall issue without an affidavit, in cases involving more than five hundred dollars in amount. In the District Court for the Southern District of New York, where the demand is of a liquidated nature, the clerk may issue a warrant of arrest; in all other cases, the order of the Judge is required.[3] In the District Court for the District of Massachusetts, in cases of arrest of person or property, the order of the Judge must be obtained unless the libellant does not require the defendant to be holden to bail in a larger sum than one hundred dollars. In those cases, upon affidavit filed in the office of the clerk, he is authorized to issue in vacation the common warrant of arrest.

Admiralty process for seamen's wages against a ship in possession of the Sheriff by virtue of a Common Law proceeding, merely suspends the Sheriff's lien, and he is entitled

[1] Manro v. Almeida, 10 Wheat. R. 473.
[2] Rule 2. [3] Rules 16, 17.

to the proceeds in the Court of Admiralty after the discharge of the maritime lien.[1] (a)

[1] The Flora, 1 Hagg. R. 298.

(a) The lien of material-men is not devested by execution and judgment in favor of the United States.—The Thomas Scattergood, Gilpin R. 1.

CHAPTER V. 143

BAIL AND STIPULATIONS IN SUITS IN PERSONAM.

THE security, taken upon an arrest of the person in a civil suit of Admiralty and maritime jurisdiction, is a bail bond, the form of which, probably, varies in different districts of the United States, and is conformed to the bail bonds in use in the practice of the different State Courts. In the District Court of the United States for the District of Massachusetts, the common bail bond in Admiralty resembles that taken in Common Law causes, and causes pending in the State Courts of Massachusetts; and the form of the condition is, that the defendant shall appear at the Court to answer the libel, and shall not avoid but abide the final judgment thereon. There has been no express decision respecting the number of the sureties which should be required in a bail bond; but the general practice is to have two sufficient sureties, and this is the rule in the Admiralty Courts in England.[1] By the rules[2] (*a*) in Admiralty causes in the District Court of the United 144
States for the Southern District of New York, a bail stipulation should be made with two sufficient sureties.

The bail bond in the Admiralty in England was formerly taken in the name of the Lord High Admiral.[3] In the Ad-

[1] Clerke's Prax. Tit. 12. [2] Rule 5.
[3] Clerke's Prax. Tit. 4; 2 Bro. Civ. and Ad. Law, 434.

(*a*) See Rule 59, Dist. Rules for the Southern District N. Y.—Appendix.

miralty practice of the United States, the bond is taken in the name of the Marshal of the District by whom or by whose Deputy the defendant is arrested on the original warrant of arrest.[1]

Persons who have no property in the country should not be accepted as bail by the Marshal.[2]

The bail taken on the original warrant of arrest are, by the general rules of Admiralty practice, only bound that the defendant shall appear at the time and place of trial before the Court, and perfect his appearance, and complete the security, by entering into such a stipulation as is required by the law and usage of Admiralty Courts.[3]

By the rules[4] of the Circuit Court of the United States for the First Circuit, in civil causes of Admiralty and maritime jurisdiction, it is provided, that on warrants to ar-
145 rest the person in Admiralty and maritime causes, if the bail be taken by the Marshal or his Deputy, or other person serving the same, it shall be on condition for the appearance of the defendant on the return day, to answer to the plaintiff, in a cause civil and maritime. And nothing shall in such case be deemed a legal appearance, but the party's appearance at the return day of the warrant, and submitting himself for commitment, or giving a stipulation with sureties, according to the course of the Court, with condition, that the defendant shall answer the said action, and ratify the acts of his proctor, and that he and his sureties shall abide all interlocutory orders and decrees, as well as the final judgment rendered in the cause by the District Court or on appeal by any appellate Court; and like-

[1] Hall's Ad. Prac. 11, *note.*
[2] Clerke's Prax. Tit. 4, *note.*
[3] Ibid, Tit. 5.
[4] Rules 3, 4.

wise pay whatever shall be adjudged therein, and costs and expenses; and unless they shall so do, that they severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods, chattels, and lands, wheresoever the same shall be found, to the value of the sum in which they shall stipulate; and, at the time of entering into the stipulation as aforesaid, the Court will direct the defendant to file a stipulation to indemnify them. This stipulation by the principal party to in- 146
demnify his sureties, by the general rules of Admiralty practice, may be taken at the same time and in the same record with the original stipulation, and should be in double the amount, or at least in a greater amount than that of the original stipulation.[1] In proper cases, as of death or insolvency of the sureties, the Court may, on motion of the plaintiff, require the defendant to give a new stipulation, and, in default thereof, will decree the original stipulation forfeited.[2] In all cases of attachment under Admiralty process, the attachment may be dissolved on the party's giving a stipulation with sureties to the same effect as in cases of arrest.[3]

By the rules[4] (*a*) of the District Court of the United States for the Southern District of New York in Admiralty cases, it is provided, that, upon the arrest of a party on process *in personam*, the defendant shall be held on the return day of the process, either to appear in person and submit him-

[1] Clerke's Prax. Tit. 18.
[2] 2 Bro. Civ. and Ad. Law, 412.
[3] Clerke's Prax. Tit. 37.
[4] Rule 5.

(*a*) Rules altered in 1838; see Appendix, Rules 21, 24, 38, 59. See New Rules of the U. S. Supreme Ct., Rule 3.

self for commitment, or to enter into a bail stipulation in the sum endorsed on the process for bail, with two suffi-
147 cient sureties, who shall engage jointly and severally that the party arrested shall, wherever required by this Court, or by any appellate Court, in case of an appeal, appear, answer, perform, and abide the orders and decrees thereof, interlocutory and final, or deliver himself personally for commitment, in the execution of its process, orders, or decrees, to the officers of such Court; and, in default thereof, execution may be issued against the sureties, their lands, goods, and chattels, for the amount in which they shall stipulate, and the writ of *fieri facias* or *venditioni exponas* is adopted by this Court, as the execution to be issued against bail in such cases.

There is an important difference between the rules of the Circuit Court of the United States for the First Circuit, and those of the District Court of the United States for the Southern District of New York, in respect to the extent of the liabilities of the sureties in an Admiralty stipulation. By the former the defendant is required, by the original bail bond, to appear at Court and to enter into a stipulation, with obligations among other things to pay whatever shall be adjudged in the suit, and costs and expenses. By the latter, the defendant is bound, with his sureties, to
148 submit himself personally for commitment, to the officers of the Court in the execution of its process and decrees. The rule of the Circuit Court of the United States for the First Circuit is in conformity with the general rules of Admiralty practice, according to which the stipulations are not discharged, by surrendering the principal, as bail are by

the Common Law; for the *fidejussores*, or sureties, are absolutely bound, and were so by the Civil Law, *judicatum solvere*, to pay the costs and condemnation at all events.[1] 3 Black Com 2

If the defendant does not appear, he is deemed to be in contumacy and default, and the Judge will pronounce and decree the bail bond forfeited.[2]

The proctor for the libellant should take care, if the defendant does not regularly appear and duly enter into a stipulation, according to the law and usage of Admiralty Courts, to have him thrice regularly called, and then to obtain a decree pronouncing the bail bond forfeited, and awarding a judgment against the defendant and his sureties. The form of proceeding is thus given in Clerke's Praxis,[3] and translated in Hall's Admiralty Practice.[4]

"The Proctor for the plaintiff appears before the 149 Judge, saying as follows:

"'I exhibit my proxy in writing (or *apud acta*, if he was thus constituted) for N. (*i. e.* for the plaintiff,) and make myself party to the same; and I exhibit the original mandate with the certificate endorsed thereon (or upon the execution, of which the mandatory here present in Court attests by his oath.) And I accuse M. of contumacy, because he was bound to make his legal appearance here this day (as well by the tenor of the mandate as by the stipulation or undertaking of his bail bond, which was executed in this behalf and remains in the hands of the Registrar, or which is now ready to be exhibited by me,) and is not now forthcoming.

[1] 2 Bro. Civ. and Ad. Law, 412, *note*.
[2] Clerke's Prax. Tit. 9.
[3] Tit. 9.
[4] P. 24.

"'Wherefore I pray that he be declared in contumacy, and that in pain of such contumacy he be declared to have incurred the forfeit of his bond.'"

The above form, with some slight modifications, is well suited to the practice of the Admiralty Courts of the United States. It is the practice to obtain a decree of forfeiture of the bail bond by a motion in Court, which is usually made in writing, as it always should be in a case of any
150 considerable importance. The bail upon this decree becomes fixed, and an execution issues against the principal and bail jointly for the amount of the judgment which may be recovered.

In the event of the death of the principal, in a case where the cause of action does not survive, before the appearance day the bail should cause a suggestion to be made to the Court in writing, and pray that the libel may be dismissed. And, where the cause of action survives, they should make a similar suggestion of the death of the principal, and pray that the plaintiff may be required to summon the personal representatives of the deceased, to take upon themselves the defence of the suit, and that the regular stipulation be entered into.

When the defendant appears, his proctor should take care that the appearance be duly entered, and the bail bond discharged by the defendant's entering into such a stipulation as the rules of the Court may require.

The stipulations, or securities, or cautions, as they are called in the Civil Law, are of three sorts:

1. *Judicatum solvi;* by which the party is bound absolutely to pay such sum as may be adjudged by the Court.

2. *De judicio sisti;* by which he is bound to appear 151
from time to time during the pendency of the cause;
to abide the sentence, and also to pay a tenth part of the sum in dispute if he should be defeated. This latter clause, respecting the payment of the tenth part of the sum in dispute in case of defeat, is not known in the Admiralty practice of the United States.

3. *De ratio* (or *De rato*); by which he engages to ratify and confirm the acts of his proctor. This stipulation is not usual in the Admiralty practice of the United States.

The manner in which these securities are taken are,

1. *Cautio fidejussoria;* by sureties. This is the ordinary stipulation.

2. *Pignoratitia;* by deposit. This security, though not common, is sometimes given in the Admiralty Courts of the United States.

3. *Juratoria;* by oath. This security is given when the party is too poor to find sureties, and the Courts may, in their discretion, admit in such a case the party to the juratory caution.

4. *Nudè promissoria;* by bare promise. This is not known in the Admiralty practice of the United States.[1] These
securities do not authorize the Court to proceed against 152
lands. But by the rules of Admiralty practice in the Courts of the United States for the First Circuit,[2] and in the District Court of the United States for the Southern District of New-York,[3] the common stipulation contains an express provision that an execution may issue against the lands of the stipulators.

[1] Hall's Ad. Prac. 12. [2] Rule 3. [3] Rule 59.

If the party be surrendered by his bail, and a stipulation be not put in, pursuant to the rules of the Court, he will be committed until a stipulation shall be entered into or the suit be terminated.[1] But, by the rules of Admiralty practice in civil causes in the Courts of the United States for the First Circuit, the bail bond is not considered as satisfied, and cannot be discharged, unless a stipulation be regularly entered into. By the same rules of Admiralty practice the juratory caution or security may be given in proper cases upon the oath of the party that he is poor and unable to find sureties. In such a case he is admitted to give the juratory caution, or security of his oath, to abide the decree of the Court.[2]

153 If the *fidejussores*, proposed as the sureties in the stipulation, should not be known or should not be sufficient for the amount required, the proctor for the adverse party may protest against their being received, and pray that better security may be offered. This protestation should be made at the time the sureties are proposed, as afterwards more substantial sureties cannot be required.[3]

The question, respecting the sufficiency of the sureties, is usually decided summarily by the Judge. The mode is, by inquiry of persons in Court, or by certificates of collectors of taxes, Government officers concerned in the collection of the revenue, or merchants acquainted with the reputed circumstances of men in trade. If time be requisite for the purpose of making further inquiries and of producing proof, it will be granted. Sometimes the Judge will decide upon his own opinion or knowledge respecting the sufficiency of the sure-

[1] Clerke's Prax. Tit. 5, 9. [2] Ibid, Tit. 5; Hall's Ad. Prac. 13, *note*.
[3] Clerke's Prax. Tit. 13.

ties. If the Judge shall be of the opinion that the sureties are not sufficient, the party will be required to furnish better sureties immediately, or at some future day. If the Judge shall be satisfied of the sufficiency of the sureties, a decree will be passed that the sureties are 154 sufficient and may be received, or the protestation will be disregarded.[1]

Among the ancient usages of the Admiralty Court was this practice, that, when the stipulation was entered into, the principal also entered into another collateral stipulation to indemnify his *fidejussores*.[2] This usage is not frequent in the practice of the Admiralty Courts of the United States, although there is a rule[3] of the Circuit Court of the United States, for the First Circuit, in conformity with the ancient practice. See p 143

A stipulation with *fidejussores* may be required of the plaintiff by the defendant, by which the plaintiff is bound to prosecute his suit, and to pay the defendant's costs, in case the defendant shall prevail; and also for the plaintiff's appearance, when it may be required by the defendant, in the course of the trial, for the purpose of answering interrogatories.[4] The mode of taking this stipulation is the same as when the defendant gives a stipulation; and the observations made upon the defendant's stipulation apply to the stipulation made on the part of the plaintiff.

Although the *fidejussory* caution has been put in by 155 both parties, yet if the *fidejussores* afterwards become insolvent, during the pendency of the cause, the party for

[1] Clerke's Prax. Tit. 16, 17.
[2] Ibid, Tit. 18.
[3] Rule 4.
[4] Clerke's Prax. Tit. 14.

whom they were sureties may be required to give other and better security.[1] When the security is prætorian or judicial, upon the death or insolvency of one of the *fidejussores*, additional security may be required; otherwise when the security is conventional. The form of protestation against the sufficiency of the *fidejussores* is a direct allegation, by the proctor, that the surety objected to is generally reputed to be a poor man, and, especially, not worth the sum for which he is proposed to be bound; and it is concluded with a prayer, that better and more substantial security be given by the adverse party, or that he be taken into custody until such security be given. On the other side this protestation is opposed by a counter protest, in which the nullity of the petition is asserted, the truth of the allegations denied, and an allegation is made that the *fidejussores* proposed are sufficient and able to pay the amount required in the stipulation, and so commonly reputed and esteemed; and it
156 concludes with a prayer that additional security may not be required.

By the rules[2] of Admiralty practice in the Admiralty Courts of the United States for the First Circuit, the Court will, on motion of the defendant, direct the plaintiff, except where the suit is for the United States, on pain of dismissing his libel, to give a stipulation with sureties to appear from time to time, and abide all interlocutory orders and decrees, as well as the final judgment, which may be rendered in the cause in the District Court, or, on appeal, in the appellate Court, and likewise to pay the costs, which shall be ad-

[1] Clerke's Prax. Tit. 15. [2] Rule 7.

judged therein against him, in case he fails to support the same cause.

By the rules[1] of Admiralty practice in the District Court of the United States for the Southern District of New York, no original process *in rem* to answer shall be issued, nor claim be received, nor third person permitted to intervene, unless a stipulation, for the benefit of whom it may concern, shall be first entered into by at least one resident of the District, in the sum of $250, conditioned that the party, libellant or claimant, shall pay all such costs and damages as shall be awarded against him by the Court, 157 or, in case of appeal, by the appellate Court; and the competency of the surety shall be examined by the Clerk, on oath, and allowed by him. Any party may, on special cause shown, move for greater or better security, in any cause where security has been given. The sufficiency of bail shall be examined by the Clerk on oath, if required by the libellant, at the time when they shall enter into the stipulation, and be determined by him; and, if so required by either party, he shall reduce to writing their examinations; and if either party shall at the time except to the Clerk's determination, the examination shall be submitted to the Judge in four days for his decision thereon; and, until the sufficiency of the bail shall be duly allowed, the Marshal and the surety taken by him shall be held responsible for the personal appearance of the party. By an ad-

[1] Rules 14, 6. (*a*)

(*a*) Rule 14, altered to 44—Appendix; Rule 6, altered by Rule 37—Appendix. See also Rule 34, New Rules of the U. S. Supreme Court.

ditional rule[1] of this Court, the rule last referred to is declared not to be applicable to the cases of seamen suing for their wages, who are not required to find sureties for the prosecution of their suits.

By the general rules of the Admiralty practice, if either of the parties makes it appear upon oath that he is
158 unable to find sureties, he may, in the discretion of the Court, be admitted to the juratory caution.[2] (*a*) In the District Court of the United States for the District of Massachusetts, the juratory caution is often received from plaintiffs; and the Judge of that Court never refuses to hear a cause, which appears to be suitable for the consideration of an Admiralty Court, because the plaintiff is poor and unable to find sureties.

[1] Rule 45. [2] 2 Bro. Civ. and Ad. Law, 434.

(*a*) See Polydore *v.* Prince, Ware R. 402.

CHAPTER VI. 159

THE CLAIM AND STIPULATION IN SUITS IN REM.

In proceedings *in rem*, in instance causes in the Admiralty Courts, the first step in the defence is the interposition of a claim of the property libelled. This should be made in proper form, and verified and filed agreeably to the rules of the Court.

The claim should be made by a party authorized to set up a defence against the libel. (*a*) It should be made by the owner of the property libelled, or attached by the process of the Court, or his agent, or by the representative of any foreign Government, whose subjects may be interested in the property in question. A Consul is a public agent, for commercial purposes, and may interpose a claim for the restitution of property belonging to the subjects of his own country, without any special authority from those in whose behalf he may act.

A Consul is considered a competent party, by the long and universal usage of the Courts of the United States, to assert and defend the rights of property of the individuals of his nation, in any Court having jurisdiction 160
of causes affected by the application of International Law. One of the chief objects for which Consuls are ap-

(*a*) A creditor who has attached the property in a suit against the owner before the seizure, may intervene in the case as a claimant.—The Mary Anne, Ware R. 104.

pointed is to watch over the rights and interests of the subjects of their respective Governments.[1] The Consul represents the subjects of his nation, if not otherwise represented.[2] But a Consul is not considered to be a Minister, or diplomatic agent of his Sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiation with foreign States, or to vindicate his prerogatives; and he has no right to interpose a claim on account of the violation of the territorial jurisdiction of his country. He may be clothed with diplomatic power by special delegation, but does not derive such an authority from his ordinary powers. It is said, by the Supreme Court of the United States, that a claim on this ground, by a public Minister, or, in his absence, by a Chargé d'Affaires, would be good, with the assent and sanction of the Government in whose Courts the cause
161 is depending.[3] Although a foreign Consul will be admitted to interpose a claim in the Admiralty, in behalf even of unknown subjects of the Government which he represents, yet, before a restitution can be obtained, proof of the individual proprietary interest must be obtained. His right to receive property, in the absence of specific powers, given him by competent authority, is not recognised in the Admiralty Courts of the United States.[4] But much depends, as the Court intimated, on the laws of the country, from which, and to which, he is deputed.[5]

The claim is frequently, in practice, united with an answer, and the proceeding is commonly called the claim and

[1] The Bello Corrunes, 6 Wheat. R. 152; The London Packet, 1 Mason R. 14; The Antelope, 10 Wheat. R. 66; The Anne, 3 Wheat. R. 435.

[2] Gernon v. Cochran, Bee. Ad. R. 208. [3] The Anne, 3 Wheat. R. 435.

[4] The Bello Corrunes, 6 Wheat. R. 152. [5] Ibid.

answer. This is not the most correct practice. The claim and the answer are distinct proceedings in a suit in the Admiralty. The object of the claim is to set up a right to defend the suit, and to offer an answer to the libel. The object of the answer is to set forth the grounds of defence, after the claim has been admitted.

The claim should be verified by the oath, or supported by an accompanying affidavit, of the party making it, and the party in behalf of whom it is made. When the principal resides in the country, or within a convenient distance, the claim should be made by him, or be accompanied by his affidavit. But when the principal resides out of the country, or at a great distance, a claim by an agent will be received.[1] 162

The occasions on which these rules have been recognised in the Admiralty Courts of the United States, were prize cases; but their reasonableness would seem to require an application generally to instance causes, in order to guard against irregularities in all cases, in which great inconvenience will not be occasioned.

Where there are separate interests, it is the practice, in the District Court of the United States for the District of Massachusetts, to require separate claims in behalf of the respective owners of the several interests. This is the only mode in which the proceedings can be regularly conducted, and the record of the cause rightly made. The propriety of this proceeding has been fully recognised in the Supreme Court of the United States.[2]

[1] The Adeline, 9 Cranch R. 244; The Sally, 1 Gall. R. 401; The St. Lawrence, 1 Gall. R. 467. [2] Stratton v. Jarvis et al., 8 Pet. Sup. Ct. R. 4.

The contumacy of one claimant is not permitted to prejudice another, as one claimant should not suffer for the neglect or fault of another.[1]

163 A new claim will not be received in the Supreme Court of the United States, but the cause will be remanded to the Circuit Court, from which it was brought by appeal, where the claim will be received.[2]

Generally, before a claim can be allowed, and the claimant admitted to defend, in the Admiralty, against the libel, a stipulation, according to the usage of Admiralty Courts, must be entered into. The mode of taking the stipulation, and the form, are varied, according to the rules of the respective Courts. The Admiralty stipulation, in the British Admiralty Courts, is not under seal, because it is considered, in the British Common Law Courts, that the Admiralty can exercise no jurisdiction in cases of recognizances and sealed instruments. In the Admiralty Courts of the United States, whatever may be the form of the security, whether by bond or stipulation, the Court having possession of the principal matters, has jurisdiction over all the incidents, and may enforce its decrees against the parties to the security.[3]

In a civil cause of Admiralty and maritime jurisdic-
164 tion, the Court may take a fidejussory caution, or stipulation, in cases *in rem*, and may, in a summary manner, award judgment and execution thereon. The claimant, by making a claim, and giving a bond or stipulation, required by the practice of the Court, thereby admits the right of the Court to apply its general practice. A bond in an Admiral-

[1] The Mary, 9 Cranch R. 143. [2] The Société, ibid, 209.
[3] 2 Bro. Civ. and Ad. Law, 97, 412; The Alligator, 1 Gall. R. 145.

ty cause is, to all intents and purposes, a stipulation in the Admiralty.[1]

The object of the stipulation, which is required on the admission of a claim, is to secure to the libellant the payment of the costs, which may be incurred by the defence, in case the claim shall not be sustained by the decree of the Court.

By the rules of the Circuit Court of the United States for the First Circuit, in civil causes of Admiralty and maritime jurisdiction, it is provided, that, in all cases of proceedings *in rem*, the claimant shall verify his claim of property by affidavit, and in such cases (unless where it is otherwise provided by statute) he shall file a stipulation with sureties, for the payment of all costs which shall be decreed against him, as well in the District Court, as on appeal in the appellate Court, in case he shall fail to support his claim.[2]

Where a party claims property, or the proceeds of 165
property libelled, he will be required to file a security, according the rules of the Court; and, if he neglects to do it, the claim will be disregarded.[3]

By the rules in Admiralty cases, in the District Court of the United States for the Southern District of New York,[4] (*a*) it is provided, that no claim shall be received, or third person permitted to intervene, unless a stipulation for the benefit of whom it may concern shall be first entered into, by

[1] The Alligator, 1 Gall. R. 145; The Octavia, 1 Mason R. 149; McLellan *v.* U. States, 1 Gall. R. 227.
[2] Rule 14.
[3] The Louisetta, 2 Gall. R. 307.
[4] Rules 14, 17, 18, 19, 20, 21, 22.

(*a*) See Appendix, Rules 37, 44, 55, 89, 91, 92, 96, 97, 98. See New Rules of the U. S. Supreme Court, 26, 28, 29, 39.

at least one resident of the District, in the sum of $250, conditioned that the claimant shall pay all such costs and damages as shall be awarded against him by the Court, or, in case of appeal, by the appellate Court; and the competency of the surety shall be examined by the Clerk on oath, and allowed by him. The libellant may, on special causes shown, move for greater or better security in any cause where security has been given. A claim may be put in, at any time after the service of process, whether in open Court or not, and before the defaults are entered; and when it shall
166 be put in, at any other time than on the making the usual proclamations for all persons interested to appear and defend, notice of the time of filing it should be given; otherwise the libellant shall not be bound to regard the claim. No claim shall be filed, unless it shall be sworn to; and, unless the claim be perfected by the stipulation, according to the rules of the Court, it will be treated as a nullity, and the defaults entered. The defaults may be entered, unless a claim be filed with the Clerk on the return day of the process, or within such further time as the Court, on cause shown, may allow; and the entering of the defaults shall exclude all claims from being afterwards filed, except by special leave of the Court. The libellant may, within ten days after the filing the claim, file exceptions thereto, for insufficiency or irrelevant matter, which exceptions should briefly and clearly specify the parts excepted to, by the line and page of the papers in the Clerk's office; whereupon the party claiming shall, within four days, give notice to the libellant of his submission to the exceptions as well taken, or set down the exceptions for hearing, and give four days no-

tice thereof, for the earliest day of jurisdiction afterwards. In exceptions for irrelevancy, if the exceptions be submitted to, or be allowed by the Court, or the hearing 167 be not duly brought on, the matter excepted to shall be struck out of the claim, by the Clerk. If the party submit to the exceptions for insufficiency, he must put in a new claim, within four days after notice of this submission; and, if his exceptions be allowed within such time as the Court shall direct, and if the hearing of the exceptions shall not be duly brought on, or the further claim duly put in, the claim excepted to shall be treated as a nullity, and the defaults of the party entered.

In the cases of seizures and libels to enforce forfeitures for violations of the laws of the United States, which are triable in the Admiralty, before a claimant can be admitted to defend, he is required, by the laws of the United States, to give bond to defend the prosecution, and to respond the cost in case he shall not support his claim.[1]

The provision of the Act of Congress of 1790, ch. 62, sec. 67, was as follows: "And if no person shall appear to claim such ship or vessel, goods, wares, or merchandise, the same shall be adjudged to be forfeited; but if any person shall appear before such judgment of forfeiture, 168 and claim any such ship or vessel, goods, wares, or merchandise, and shall give bond to defend the prosecution thereof, and to respond the cost in case he shall not support his claim, the Court shall proceed and determine the cause according to law." The provision in the Act of Congress of 1799, ch. 128, sec. 89, is as follows: "If no persons shall

[1] Act of Congress, 1790. ch. 62, § 67; Act of Congress, 1799, ch. 128, § 89.

appear and claim any such ship or vessel, goods, wares, or merchandise, and give bond to defend the prosecution thereof and to respond the cost in case he shall not support his claim, the Court shall proceed to hear and determine the cause according to law." The bond, required to be given by the Act of 1799, is considered to be a stipulation according to the course of Admiralty practice, when entered into in an Admiralty cause.[1] (a)

Whether, in a case where a party, interested in property libelled, is unable to find sufficient sureties in his stipulation, his claim can be admitted on a juratory caution, is not known to have been decided. The rules of the Admiralty Courts, which have been referred to, require surety or
169 sureties in the stipulation of the claimant. The Act of Congress requires, in the cases referred to, that the claimant shall "give bonds" to respond the cost. The Act of 1790 required that, if no person should appear to claim the property libelled, it should be "adjudged to be forfeited." The Act of 1799 provides, that, if no person appears to claim the property, and to give bond to defend the prosecution, and respond the cost, "the Court shall proceed to hear and determine the cause according to law." It would seem strange, under the laws of the United States, if a party, unable to find security in a stipulation or bond, should be deprived of a right to claim his property libelled, and to defend against a prosecution to enforce a forfeiture, when,

[1] Nelson et al. v. United States, Pet. C. C. R. 235.

(a) Lane v. Townsend, Ware R. 286.

in an Admiralty suit *in personam*, he is relieved by the juratory caution from the general obligation to find sureties. Should such a case occur, it would seem to be the duty of the proctor for the party, wishing to defend against any libel *in rem*, and unable to find sureties in a stipulation or bond to respond the cost, to tender the juratory caution in behalf of his client, and to pray the Court to receive it. The provision of the Act of 1799, that the Court, in case that no claim or bond with surety shall be put in, "shall proceed to hear and determine the cause according to 170
law," would seem to give the Court the full power of an Admiralty Court over the whole subject.

A claim may be interposed in the Admiralty by the true owner of goods, attached as the property of the defendant, but which do not belong to him. The interest of the owner should be propounded, and security given, according to the practice of Admiralty Courts, to pay the costs, in case the claimant fails to substantiate his claim of property. The libellant may also be required to give security for the costs. During the pendency of the case, the goods are kept in the custody of the Court, and if the claimant proves his interest, a decree of restitution and for costs is made. If he fails, a decree is rendered against him and for the costs which he has occasioned.[1]

The party claimant in this case may appear in person before the Judge, or by his proctor, and, according to the old form, allege as follows:

"I exhibit my proxy literally for N., and I make myself

[1] Clerke's Prax. Tit. 38.

a party to the same, and to all in better right. Moreover I allege to every effect in law, that, at the time of the interposition of the arrest, my client was in peaceable and
171 quiet possession of the goods attached, not by force, concealment, threats, nor at the will of another. And, therefore, I pray that possession of these goods be decreed to my client in preference to all others, and that he be maintained in his possession; that the attachment which was interposed by others by the authority of the Court may be dissolved, and that justice and right be done and administered."[1]

If this allegation be denied, an answer must be filed, and a time of proof and trial will be assigned.

In the Admiralty Courts in England the practice is, in the first instance, to proceed in a possessory suit; and a party, obtaining a decree for the possession, will be required to be bound with a fidejussory security, to answer the other party in a petitory action, in which the question of title will be determined. In this stipulation he will be bound to restore the goods without waste, in case the other party shall obtain a decree in his favor in the petitory suit. This must be done, when the party, against whom a decree has been rendered in the possessory cause, shall pray for a proceeding in
172 a petitory cause, or shall protest against a proceeding in the same. The goods, in such a case, are appraised by the order of the Court. If the parties will not agree to proceed in a petitory cause, the party succeeding in the possessory cause may, by a libel *de novo*, in order to confirm

[1] Clerke's Prax. Tit. 42; Hall's Ad. Prac. 84.

his right, proceed in a petitory cause, and obtain a sentence *in petitorio* confirming his title. New evidence may be introduced, as well as the testimony taken in the possessory cause, and faith and credit are given to the proceedings in that cause; for the records in one judgment are proofs in another. The party against whom the decree is rendered in the possessory cause may institute a petitory cause, and he will obtain, if he shall succeed, a decree for a restitution of the goods and for his costs. The course of the trial is according to the general practice in maritime causes in Courts of Admiralty.

While a possessory, or petitory, cause is pending, the goods are kept in the custody of the Court, or delivered into the hands of some impartial person. But, if the goods are perishable, or likely to become lessened in value, the Court will, although opposition be made, decree a valuation of the goods; and the value is to be deposited in Court, 173 for the use of the party who may succeed in the cause.[1]

In the United States, where goods have been attached as the property of one person, in which another has claimed a property, the usual course has been a replevin process by the party claiming, or actions of trespass or trover, instituted in the State Courts. But the proceedings, before related, according to the ancient practice of the Admiralty, are more convenient and speedy, and the course, which would be adopted, would be a single petitory cause, or claim, on which all the questions would be determined, and in which vari-

[1] Clerke's Prax. Tit. 42, 43.

ous claimants might join together, after the admission of their respective claims, and the whole matter be decided in one trial, as an episode to the main cause, which, in the case of numerous claimants, would, at Common Law, require numerous trials.

See act of Congress March 3. 1847

CHAPTER VII. 174

THE DELIVERY OF PROPERTY UPON BAIL.

THE Admiralty Courts may, in the exercise of a sound discretion, deliver the property libelled or arrested, in a civil cause of Admiralty jurisdiction, upon bail or security for its value. (*a*)

The practice of delivering on bail a ship arrested, in a cause of possession, is not of a very ancient date; but, in consequence of damage being sustained by ships lying for a length of time in harbour, the Court has been induced to deliver them, on bail being substituted, in place of the ship itself, to answer the demand set up in the cause.[1]

Bail in Admiralty, upon the delivery of property, will not be reduced, upon the ground that the property brought less upon a sale than the appraised value.

Bail, in a case of disputed ownership, is given for the value of the ship and her intermediate earnings.[2] But, there is a difficulty, in the Admiralty in England, res- 175
pecting the jurisdiction of the Court over accounts between part owners,[3] which does not exist in the Admiralty

[1] The Peggy, 4 Rob. R. 304.
[2] The Partridge, 1 Hagg. R. 81; The Apollo, ibid, 306.
[3] The Apollo, 1 Hagg. R. 313.

(*a*) Where proceedings *in rem* are had in the Admiralty for salvage, neither party is bound to obtain a delivery of the ship and cargo on bail; and it is no default on either side, to wait for the regular termination of the salvage proceedings.—The Nathaniel Hooper, 3 Sumner R. 542.

practice of the Courts of the United States. A claimant's bond, for the safe return of a vessel to a particular port in England, is not considered forfeited upon her being carried into another port in England in distress, where she was arrested, by the process of the Admiralty Court, in suits for salvage and wages, for she is in her general home; and it is suggested that the form of the bond in such a case should be "to return," without mention of a particular port.[1]

In a collision case the ship arrested may be delivered upon bail.[2]

In the Admiralty Courts of the United States, in all civil causes, except perhaps those of bottomry and hypothecation, it is usual for the Court, upon application, to deliver the property to the claimant, from whose possession it has been taken, upon bail or stipulation, with ample security, conditioned, in some cases, for the restoration of the property, in others, for the payment of the amount which may be decreed to the libellant and his costs.[3]

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In the case of a bottomry bond, or an express hypothecation, it is not usual to deliver the property libelled upon bail, except by consent; because it would deprive the lender of the very security given by the contract upon which the action is founded, and the Court will not expose him to the slightest hazard in relation to the sureties of the claimant. But, upon a deposit in Court of the amount of a bottomry or hypothecation bond, together with a sufficient sum to cover the costs of the suit, it may be presumed that it would be delivered on the claimant's stipulation; for it is the maxim

[1] The Margaret, 2 Hagg. R. 275. [2] The Dundee, 1 Hagg. R. 109.
[3] The Alligator, 1 Gall. R. 145.

of the Admiralty, that "ships are made to plough the ocean, not rot by the wall"; and it is hardly to be supposed that the Court, in a disputed case, which might remain a considerable time in litigation, would require that a sale of a ship should be forced, or that she should "eat her head off" in custody fees and expenses.

The mode of obtaining a delivery of property on bail is by presenting a summary petition to the Court, which is usually determined speedily upon due notice being 177 given to all parties. In a case where it may be necessary to ascertain the value, so as to fix the amount for which the bail stipulation should be taken, an appraisement is made by discreet and competent persons appointed by the Judge. There are usually, in causes of importance, three appraisers appointed; but in causes of small amount, except in libels of informations for forfeitures, where the course is directed by Act of Congress, a less number is appointed. The appraisers are required to be sworn to the faithful discharge of their duty in such manner as the Judge may direct in the commission, except in cases of libels of informations for forfeitures. The appraisement is returned by the appraisers, with the commission, to the Court.

In the High Court of Admiralty in England, in a possession cause, the valuation of the ship being impeached, a new appraisement was permitted at the expense of the party applying.[1]

An application for a delivery of the property libelled on bail often accompanies the claim, or is embodied in it. In that case the stipulation is generally framed binding

[1] The Margaret, 2 Hagg. R. 275, *note*.

178 the claimant and his sureties to pay the amount which may be decreed and the costs, or to pay the costs and restore the property where restoration may be required. In other cases the stipulations for these objects are generally distinct proceedings.

In the District Court of the United States for the District of Massachusetts, in civil causes of Admiralty jurisdiction, in which the United States are not interested, the proceedings relative to the delivery of property on bail, when the convenience of suitors may require it, are transacted by the Judge out of Court, in the Clerk's office, due notice being given to all parties interested.

In possession causes the bail bond, or stipulation, looks only to the event of the loss of the ship and the payment of the estimated value to the owner.[1]

Congress has made the following provisions respecting the delivery on bail of property libelled for forfeiture. By the Act of March 2d, 1799, sec. 89, it is provided, that, "upon the prayer of any claimant to the Court, that any ship or vessel, goods, wares, or merchandise, so seized and prosecuted, or any part thereof, should be delivered to
179 such claimant, it shall be lawful for the Court to appoint three proper persons to appraise such ship or vessel, goods, wares, or merchandise, who shall be sworn in open Court for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and on the return of such appraisement, if the claimant shall, with one or more sureties, to be approved of by the Court, execute a bond in the

[1] The Apollo, 1 Hagg. R. 314.

usual form to the United States for the payment of a sum equal to the sum at which the ship or vessel, goods, wares, or merchandise, so prayed to be delivered are appraised, and moreover produce a certificate from the Collector of the District wherein such trial is had, and of the Naval Officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the ship or vessel so claimed, have been paid or secured in like manner as if the goods, wares, or merchandise, ship or vessel had been legally entered, the Court shall by rule order such ship or vessel, goods, wares, or merchandise to be delivered to the said claimant, and the said bond shall be lodged with the proper officer of the Court, and, if judgment shall pass in favor of the claimant, the Court shall cause the said bond to be cancelled; but if judgment shall pass against the claimant as to the whole or any part of such ship or 180
vessel, goods, wares, or merchandise, and the claimant shall not within twenty days thereafter pay into the Court, or to the proper officer thereof, the amount of the appraised value of such ship or vessel, goods, wares, or merchandise, so condemned, with the costs, judgment shall and may be granted upon the bond, on motion in open Court, without further delay."

By the Act of April 5th, 1832, Congress has provided, "that, in any cause of Admiralty and maritime jurisdiction, or other case of seizure, depending in any Court of the United States, any Judge of the said Court in vacation shall have the same power and authority to order any vessel or cargo or other property to be delivered to the claimants, upon bail or bond under the statute, as the case may be, or

to be sold when necessary, as the said Court now has in term time, and to appoint appraisers and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the said recognizance of bail or bond under such order may be executed before the Clerk, upon the party's producing the certificate of the Collector of the District of the sufficiency of the security offered; and the same proceedings shall be had, in
181 case of said order of delivery or of sale, as are now had in like cases when ordered in term time; provided that upon every such application, either for an order of delivery or of sale, the Collector and Attorney of the District shall have reasonable notice in cases of the United States, and the party or counsel in all other cases."

A Court of Admiralty, without any statute upon the subject, may, in a civil cause of maritime jurisdiction, deliver property on bail and take a fidejussory caution or stipulation, and render judgment and execution thereupon in a summary manner; nor is it material whether the form of the security taken be a sealed instrument, or a stipulation in the nature of a cognizance; for, being given voluntarily, upon the application of the party, it is *apud acta*, and the Court, having jurisdiction over the principal cause, has power over all the incidents, and may, by monition, attachment, or execution, enforce its decrees against all who become parties to its proceedings.[1]

In the Exchequer Court in England, property is not delivered on bond, unless it be perishable, or the Government officers have been guilty of delays in the prosecution;

[1] The Alligator, 1 Gall. R. 145; The Octavia, 1 Mason R. 149.

but in the Admiralty a more liberal practice is adopt- 182
ed.[1] An indiscriminate delivery of property libelled
on bail is not a correct practice.[2] The provision of the Act of Congress of March 2d, 1799, does not extend to any cases except those of seizures under that Act, nor is it compulsory upon the Court. It rests in sound discretion whether property libelled shall be delivered on bail in any case.[3] If a party has property delivered to him on bail, he is estopped to contest the validity of the security.[4] If the bail bond, or stipulation, should not be rightfully taken, the Admiralty has the power to compel by its process a redelivery of the property.[5]

In instance revenue causes in the Admiralty, the judgment upon the bond, given for the delivery of the property, pursuant to the Act of 1799, should be in open Court after the lapse of twenty days after condemnation of the property libelled, and not before.[6] In the District Court of the United States for the District of Massachusetts, the practice in an instance revenue cause, where the property libelled has been delivered upon bail, is to keep the cause in
Court, until after the lapse of twenty days after con- 183
demnation, and then to move for a summary judgment
on the bond against the claimant and his sureties. The judgment upon the bond is an incident to the original cause, and upon appeal the bond follows the cause, and, upon affirmation of the decree in the appellate Court, the fruits of the bond may be obtained in the same way as in the inferior Court.[7] But it has been decided, in the Circuit

[1] The Struggle, 1 Gall. R. 477. [2] Ibid. [3] Ibid. [4] Ibid. [5] Ibid.
[6] McLellan v. United States, 1 Gall. R. 227. [7] Ibid.

Court of the United States for the Third Circuit, that upon an affirmation, in the Circuit Court, of a sentence of condemnation in a revenue instance cause, the summary judgment may be immediately rendered upon the bond against the claimant and his sureties, without waiting the lapse of the twenty days, the Court considering the bond as an Admiralty stipulation, and the delay of judgment on the bond for twenty days after condemnation as only applicable to the proceedings in the District Court.[1] It has been decided, in the Circuit Court of the United States for the First Circuit, that when any of the parties to such an Admiralty bond or stipulation dies, pending the proceedings, the Court has a right, in the exercise of its general Admiralty jurisdiction, to reach the effects of the deceased in the hands of his representatives. Separate judgments and executions may be taken against the surviving parties, and a simultaneous proceeding had against the personal representatives of a deceased party. In such a case, if the surety brings the money into Court, subject to its order, the Court, in the exercise of the equitable jurisdiction of the Admiralty, will allow the Attorney of the United States to proceed against the principal in the bond and his representatives, in the name of the United States, to enforce an indemnity for the benefit of the surety.[2]

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By the rules[3] (*a*) of the Circuit Court of the United States for the First Circuit, it is provided, that, in all cases of attach-

[1] Nelson et al. *v.* United States, Pet. C. C. R. 235.
[2] The Octavia, 1 Mason R. 149. [3] Rules 10, 15, 16, 27, 28.

(*a*) The Act of Congress of March 14, 1848, places attachments in the

ment under Admiralty process, the attachment may be dissolved on the parties giving a stipulation with sureties to the same effect as in cases of arrest; and in all proceedings *in rem*, where the property is perishable, the Court will, on application of either party, direct an appraisement and delivery on payment of the value into Court, or a sale, as circumstances may require; and in proceedings *in rem*, where the case is not otherwise provided for by statute, the Court will, in its discretion, deliver the property to 185
the claimant, on his giving a stipulation with sureties without delay to pay the amount of the appraised value of such property into Court, or so much as the Court shall order or decree, whenever the same shall be ordered or decreed by the District Court, or on appeal by the appellate Court, without delay; and, if such payment be not made within ten days after such order or decree, and no appeal intervene in the principal cause, the Court will direct execution immediately to issue of course against all the parties to such stipulation. If, in possessory suits, after decree for either party, the other shall make application to the Court for a proceeding in a petitory suit, the property shall not be delivered over to the prevailing party until after an appraisement is made, nor until he shall give a stipulation with sureties to restore the same property without waste, in case his adversary shall prevail in the petitory suit, and also to abide, as well all interlocutory orders and decrees, as the final sentence and decree of the District Court, and, on

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United States Courts on the same footing with those in the State Courts, as regards their dissolution.

appeal, of the appellate Court, and pay the costs. Stipulations in Admiralty and maritime suits may be given
186 in open Court, or before such commissioner or commissioners as shall be duly authorized by the Court for that purpose.

In the rules[1] (*a*) of the District Court of the United States for the Southern District of New York, in civil causes of maritime jurisdiction, there are similar provisions, relative to the dissolution of an attachment of property under Admiralty process, and to the delivery of property on bail in possessory suits. It is also provided by those rules, that no property, in the custody of any officer of the Court, shall be delivered up without the order of the Court; but such order may be entered of course by the Clerk, on filing a written consent thereto by the proctor of the party in whose behalf it is detained.[2] Where proceedings on a decree shall not be stayed by an appeal, and the decree shall not be fulfilled or satisfied in ten days after notice to the proctor of the party against whom it shall be rendered, it shall be of course to enter an order that the sureties of such party, for the appraised or agreed value of property delivered on stipulation, cause the engagement of their stipulation to be performed, or show cause in four days, or on the first day of jurisdiction afterwards, why execution should not be
187 issued against them, their lands, goods, and chattels, according to their stipulation; and, if no cause be then shown, a summary judgment shall be rendered against them

[1] Rules 26, 37, 42. [2] Rule 69.

(*a*) See New Rules of the U. S. Supreme Court, 4, 10, 11.

on their stipulation, and execution issue; but the same may be discharged on the performance of the decree and payment of all costs.[1] The stipulation to be given upon the releasing and delivering up of the property, arrested by the process of the Court, shall be conditioned that the claimant and his sureties shall, at any time, upon the order or decree of the Court to which the cause may proceed, and notice of such order to the proctor of the party to whom the property shall have been delivered, bring into Court the appraised or agreed value, and in default thereof a summary judgment may be entered upon the stipulation, and execution thereon issued against the stipulators and their goods and lands.[2] Notice shall be given of all applications for delivering up property arrested upon stipulation, which notice shall specify the sureties intended to be given, and their occupations and places of residence, and the sureties shall be examined as to their sufficiency, at the time of hearing their application, if the party require it.[3] The Clerk of the Court shall register in a book each bond taken for the appraised or agreed valuation 188 of vessel, goods, wares, and merchandise, and every other description of property libelled in the Court, and all bonds to prosecute and defend.[4] In all cases, where judgment is entered on a bond or stipulation, filed with the Clerk, for the appraised or agreed value of any property libelled, he shall receive, in addition to the amount of the bond, interest at the rate of six *per cent. per annum*, for the time which shall intervene between the entry of the judgment and the day when the money shall be paid into

[1] Rule 145. [2] Rules 42, 59. [3] Rules 37, 41. [4] Rule 43.

Court;[1] and the same provision is made in cases of condemnation.[2] Orders may be entered of course by the Clerk, on motion of any party, for the appraisement of property arrested, by three appraisers, one of whom shall be an appraiser of the port of New York, one a warden of the said port, and the other a respectable merchant of the city of New York, to be selected from the last pannel of jurors returned to the Court, all to be nominated by the Clerk; or a special order for an appraisement by other persons may be moved for, or may be entered of course upon filing a stipulation of the libellant's and claimant's proctors to that effect, containing the names of such appraisers.[3] The appraisers must be sworn, or
189 affirmed, to the faithful discharge of their trust, before executing it, before the Clerk or his deputy (who are appointed commissioners for this purpose); and they are required to give notice of the time and place of making the appraisement, by affixing the same in some conspicuous place in the Marshal's office, that all persons concerned may be informed thereof and heard before the appraisers; and the appraisement must be returned to the Clerk's office.[4] No property shall be released from detention upon appraisement and surety, until the costs and charges of the officers of the Court, to be allowed by the Court so far as the same shall have accrued, shall first be paid by the party at whose instance the appraisement shall take place; and the fees of the appraisers are also required to be first paid by the same party.[5] In cases of condemnation, where bonds have been

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[1] Rule 71. [2] Ibid. [3] Rules 62, 63.
[4] Rule 44, altered by Rule 66. See Appendix. [5] Rule 68.

executed for the payment of the appraised or agreed value of property, and in case of mitigations of forfeitures by the Secretary of the Treasury, the gross amount of the moneys payable in either case shall be paid into Court.[1]

In cases where the United States is a party, no delivery on bail ought to be made, without notice to the Attorney of the United States, and a hearing before the 190 Judge. The Government have a right to be heard, as to the propriety of a delivery on bail, the appointment of appraisers, and the sufficiency of the bail; and no delivery should be made until all objections have been heard and considered.[2]

In the proceedings of an Admiralty Court *in rem*, the Court acts on the thing itself. It decides who has the right, and orders the delivery to the party having the right; and the property in contest will not be left in possession of either of the parties demanding it without security, while the cause is depending.[3]

Where the property does not follow the cause into the appellate Court, the Court in whose custody it is, may make any order respecting it after an appeal which circumstances may require, as if the cause were still pending in that Court, and may order a sale or delivery on bail. But, where the property follows the cause into the appellate Court, all jurisdiction is gone from the inferior Court. In appeals from the Vice-Admiralty Courts of Great Britain, and from the High Court of Admiralty, the general course is to remit the final decree to the inferior Court for ex-

[1] Rule 48 of the old Rules; omitted in Rules of 1838.

[2] *Ex parte* Robbins, 2 Gall. R. 320.

[3] Jennings *v.* Carson, 4 Cranch R. 23.

191 ecution, and the property is deemed still in the possession of the inferior Court, which may, pending the appeal, make any order for the delivery or sale thereof. On appeals from the Circuit to the Supreme Court of the United States, the final decree of the latter is directed to be remanded to the former for execution. But, on appeals from the District to the Circuit Court, no authority is given to remand the cause to the former for execution; and after an appeal the property is removed from the legal custody of the District Court, and is no longer subjected to its interlocutory orders.

Whenever a stipulation is taken in an Admiralty suit for the property, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are liable to the exercise of all those authorities on the part of the Court, which it could properly exercise, if the thing itself were in its custody; and this is the known course of the Admiralty.[1]

[1] The Palmyra, 12 Wheat. R. 10.

CHAPTER VIII. 192

THE PLEADINGS.

THE pleadings on the part of the defendant usually consist of exceptions, and the answer. Exceptions correspond with pleas in abatement, and demurrers, at Common Law. The answer is like a plea in bar, or the general issue, at Common Law.[1]

In proceedings strictly according to the course of the Civil Law, the exceptions include more than is understood by the term in the ordinary practice of Courts of Admiralty. Exceptions, in the practice of the Civil Law, are sometimes peremptory, like pleas in bar, destroying, when sustained, the action of the libellant; or they merely delay and postpone the libellant's remedy by the action he has instituted, like pleas in abatement.[2]

This difference should be observed relative to pleas in abatement at Common Law, and the dilatory exceptions of the Civil Law. Most pleas in abatement, if sustained, utterly destroy the pending action, and turn 193
the plaintiff round to seek for justice by a new action. When a plea in abatement for the non-joinder of a party, who should have been made a party to the suit, is adjudged good, there is no mode at Common Law of correcting the omission, and adding new parties. But, in Courts where the rules of practice are those of the Civil Law, as a Chan-

[1] 2 Bro. Civ. and Ad. Law, 363. [2] Ibid, 364.

cery or Admiralty Court, if the exception of an omission to join proper parties be sustained, the suit will not be destroyed; because new parties may be added by a supplemental bill, or libel. Perhaps there is no matter purely in abatement at Common Law, which is fatal to a suit in the Admiralty, except a good exception founded on a want of jurisdiction in the Court over the cause. All other cases of exception, founded on formal objections, do not destroy the action, but are purely dilatory; and the errors may be cured by amendments, and the addition of new parties, upon such terms as the rules of the respective Admiralty Courts impose. (*a*)

Exceptions, founded on objections in matters of substance, which in the Civil Law totally destroy the libellant's right of action, and which constitute a complete bar, are
194 called by the civilians *perpetual*.[1] They resemble pleas in bar and general demurrers at Common Law. Exceptions merely of a formal character, and which operate to occasion only delay or postponement, are called *temporary*.[2] An exception of *res judicata*, that the matter now drawn into controversy has been already adjudicated upon, and is beyond the reach of appeal or revision, or that a compromise, or complete settlement of the dispute, has been effected since the commencement of the suit, is an instance of a perpetual exception according to the Civil Law.[3]

[1] 2 Bro. Civ. and Ad. Law, 362. [2] Ibid, 363. [3] Ibid.

(*a*) Certain Logs of Mahogany, 2 Sumn. R. 589; The William Harris, Ware R. 368.

The pleadings on the part of the defendant, according to the Civil Law, consisted of exceptions perpetual and temporary, and defensive allegations. The exceptions were resorted to, when the defendant could allege any thing, by which the libellant could be excluded, evaded, or escaped, although the original ground of his action might not be entirely taken away. Thus the subject matter of pleas in abatement, in bar, and demurrers, were the grounds of exceptions perpetual and temporary in the Civil Law.[1]
But matters of defence, which took away entirely the 195
libellant's cause of action, as denials of there ever having been any cause of action, and allegations of payment or satisfaction before the commencement of the suit, were called, in the Civil Law, a *defensio*, or defensive allegation.[2] According to some authorities, every exception is called a *defensio*.

By the rules of practice in the ancient Civil Law Courts, several exceptions might be put in, one after another, unless it were apparent that the object of the multiplication of exceptions was to create unnecessary expense or delay. In such a case this liberty was restricted. But, in the modern Civil Law Courts in Europe, all exceptions, the grounds of which are known to the defendant, must be presented at once.[3]

When the defendant had pleaded, the libellant replied, and his replication was called a *duplicatio*. In well-regulated tribunals of the Civil Law, the pleadings on both sides are then generally terminated. But sometimes the pleading

[1] 2 Bro. Civ. and Ad. Law, 363. [2] Ibid. [3] Ibid, 366, *note* 27.

was extended to a *duplicatio* and *quadruplicatio*, corresponding with the rejoinder and rebutter of the Common
196 Law practice.[1] In the Admiralty Courts of Holland, even a *duplicatio* is not permitted.[2]

In the Courts of Admiralty in England, the defence is stated either by exceptions or answer. When defensive matter is thus pleaded, the libellant may reply in the various modes of replication, which his case may require. But most causes in Admiralty are decided upon no other pleadings than the libel and the exceptions or answer. If the defensive allegation be of the nature of a plea in bar at Common Law, the plaintiff may deny the allegation. There may be a peremptory exception to the defensive allegation, which is similar to a demurrer at Common Law. There may be a special replication; although such a proceeding is infrequent, and by some authorities it appears to be considered irregular pleading.[3]

Double pleading is not allowed in the Admiralty practice.[4] It is not, indeed, necessary; for the exceptions in answer may include all the various grounds of exceptions in defence, known to the party, in distinct allegations. This rule preserves simplicity and consistency in the plead-
197 ings, restrains parties to the truth, and prevents the repugnancy and apparent falsehoods spread upon the record by inconsistent pleas in Common Law proceedings.

In the Court of Admiralty in England, the defence is usually stated by an answer. The answer may be a general confession, in which the libel is said to be contested affir-

[1] 2 Bro. Civ. and Ad. Law, 367.
[2] Clerke's Prax. Tit. 19, *note*.
[3] 2 Bro. Civ. and Ad. Law, 415.
[4] Ibid.

matively, which resembles a general demurrer at Common Law, and in which the defendant insists that the libellant has not a legal case upon his own statement. It may be a general denial of the truth of the allegations in the libel, resembling the pleading of the general issue at Common Law. The libel is then said to be contested negatively. The libel may also be opposed by exceptions, peremptory or dilatory, or a defensive allegation. These exceptions, or defensive allegations, being replied to, in cases where replications may be required, the suit is in a state of contestation of law or fact, which is correspondent to the making up of an issue of law or fact at Common Law.[1]

In the Admiralty Courts of the United States, as in England, and in the Courts of Admiralty on the 198 continent of Europe, causes are generally decided with no other pleading than the libel and exceptions or answer; although there are instances of a much greater extension of the liberty of pleading.[1] Exceptions, in the Admiralty Courts of the United States, are generally presented in the form of special answers. They are usually founded on objections, which, at Common Law, are matters of abatement. The answer is generally to the merits; and, in the American practice, the distinction of a *defensio* and an answer does not seem to be recognised.

The answer is required to meet the allegations in the libel, and to state fully and explicitly the grounds of defence. A replication, even as a matter of form, is seldom filed. It has not been the practice, even in cases of libels of information for seizures cognizable in the Admiralty, in

[1] 2 Bro. Civ. and Ad. Law, 414. [2] Hall's Ad. Prac. 174, 179.

the District Court of the United States for the District of Massachusetts, to file the general replication to the answer. But, in the District Court of the United States for the Southern District of New York, it is the practice, in such cases, to file the general replication denying the truths
199 of the allegations in the answer, and affirming the truths of the allegations in the libel, and offering to verify them. There are, however, few cases in which good pleaders cannot allege in the libel and answer all the grounds of the action and of the defence. (*a*)

The distinction of peremptory and dilatory exceptions does not appear to have been recognised in the Admiralty practice of the United States; for a peremptory exception, in the nature of a general demurrer, would generally be presented in the form of a special answer. Perhaps a plea to the jurisdiction may be considered a peremptory exception; and, when there is ground for such a plea, it should be presented *in limine*, in order to save further labor and expense, which must be unavailing in a case over which the Court has not jurisdiction.

It has been decided, in the District Court of the United States for the District of South Carolina, that a plea to the jurisdiction, in an Admiralty cause, must be upon oath and exhibited *in propriâ personâ;* it cannot be presented by a proctor, because, as the party sued must ratify the act of the agent, he thereby admits the jurisdiction of the

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(*a*) A special replication by the libellant under oath is not admissible, unless it be demanded by the respondents, or ordered by the Court; and then it is in the nature of a cross-bill or reconventio of the Civil Law.—Coffin *v.* Jenkins, 3 Story, 109.

Court.[1] This strictness has not been adopted, in the 200
Admiralty practice of the District Court of the United States for the District of Massachusetts.

A protest to the jurisdiction should be presented in the earliest stage of the cause in which the defendant has an opportunity.

When exceptions, grounded on formal objections, are filed, they are speedily heard and determined, and amendments of errors in the proceedings are allowed, according to the rules of the respective Courts, and with great liberality.

The most important pleading on the part of the defendant is the answer. The commencement should contain a description of the Court, the names of the parties, and of the proctor for the defendant, and the date of the answer; and it should be respectfully addressed to the Judge of the Court, by his name, and with the addition of a description of his office. This is the caption of the answer. This is usually followed by a protestation of reservation, in which the respondent protests, that he reserves all advantages to be derived from the supposed numerous untruths, imperfections, and errors in his adversary's libel. This protestation is merely formal, and might be omitted or much
modified without injuring the style of this species of 201
legal composition. It next should contain a statement of all the grounds of defence, which should be set forth in a methodical and clear manner.

The answer should distinctly admit, or deny, the allegations in the different articles in the libel, or it will be open to exceptions for incompleteness or inaccuracy; and if any

[1] The Rambler, Bee. Ad. R. 9.

new matter by way of defence be relied upon, it should be stated with clearness and certainty, so that the points at issue may be immediately seen.[1] (*a*)

The interrogatories, propounded by the libellant, are usually responded to in the answer; and this is the most convenient course, when the interrogatories, on the part of the libellant, accompany the libel. The answer should conclude with an allegation, that the defendant is ready to verify his allegations, and a prayer, that a decree may be had dismissing the libel, and adjudging to the respondent his costs.

There are three qualities which are said to be requisite in an answer.[2]

1. It ought to be pertinent to the matter in question.[3]
202 2. It ought to be absolute and unconditional.[4]
3. It ought to be clear and certain.

The answer, like the libel, should be free from impertinence, scandal, vulgarity, and profanity. All allegations in relation to offensive subjects should be expressed in general

[1] Orne *v.* Townsend, 4 Mason R. 541.
[2] Law's Eccl. Law, 181; Ayliffe, Tit. Pers. Ans., p. 65.
[3] Orne *v.* Townsend, 4 Mason R. 541.
[4] Joseph *v.* Treadwell, 6 Mason R.

(*a*) The Boston, 1 Sumner, 328.

When a master is prosecuted in the Admiralty for punishing a seaman, he may be permitted, in justification, or in mitigation of damages, to show that the seaman was habitually careless, disobedient, or negligent in conduct. But, in order to be admitted to this defence, he must set forth such habitual misconduct in a defensive allegation in his answer, that the libellant may be enabled to meet the charge by counter-evidence.—Pettingill *v.* Dinsmore, Daveis R. 208.

terms, that the records of the Court may not be stained with disgusting statements.

An answer containing admissions must make them frankly, and not hypothetically. In a suit for a personal tort, the respondent cannot be permitted to answer, that, if he committed the wrong complained of, there were causes of justification or excuse. He must frankly admit the fact, if he intends to offer a justification or excuse.[1]

If the answer contain admissions made ignorantly and by mistake, upon proof being made the erroneous admissions may be retracted, by a decree of the Court, upon a motion or petition. It is said, that it may not be absolutely necessary to obtain such a decree, and that the party has a right to retract the admissions made in error; for, upon proof that the truth is different from the admissions, and that they were made by mistake, the adverse 203 party can derive from them no benefit.[2]

New allegations may be added to an answer, as well as to a libel, when the justice of the case may require it. This, in the discretion of the Court, may be allowed; but it is restrained from excess.[3]

The answer, so far as it relates to the actions of the respondent, should be stated according to his knowledge. So far as it relates to the actions of others, it should be according to his belief.[4] The interrogatories in the libel should be fully responded to in the answer; for the answer is evidence no farther than it is responsive to the libel.

[1] Joseph *v.* Treadwell, 6 Mason R.
[2] Law's Eccl. Law, 195; Hall's Ad. Prac. 52.
[3] 2 Bro. Civ. and Ad. Law, 416. [4] Law's Eccl. Law, 187.

Answers intended merely to cause delay, or to defeat the ends of justice, are not considered answers.[1]

If the answer is not full and explicit, upon a petition or motion by the libellant to the Court, the respondent will be required to answer more fully and explicitly; and he will be admonished, that otherwise the libel will be decreed to be confessed.[2] And if he neglects the admonition or
204 order of the Court, the allegations in the libel will be decreed to be confessed, and a final decree will be rendered accordingly.[3] This is called a presumptive confession, as confessing or granting those things to which he refuses to answer fully.[4] It is, however, considered to be the safest course for the Judge not to pronounce in such a case generally for the confession, but to specify the articles, or portions of the articles, not fully answered, to which the presumptive declaration of confession applies.[5]

The expense, occasioned by reason of the necessity of more full answers, should be defrayed by the party from whose neglect this has sprung; and the party calling for further answer, when that in the cause is sufficient, will be liable to be condemned to pay the expense of the proceeding.[6]

A verbal admonition by the Judge, speaking in the presence of the party, has the same effect as a citation, monition, or decree, in writing; and his words, in such cases, have the same effect as his official seal, in the absence of the party.[7]

[1] Law's Eccl. Law, 193. [2] Ibid, 198. [3] Ibid; Hall's Ad. Prac. 52.
[4] Law's Eccl. Law, 198, *note*. [5] Ibid, 198. [6] Ibid, 196, 198, *note*.
[7] Ibid, 188, *note*.

When a party refuses to answer, in the British Ad- 205
miralty Courts, upon oath, to the positions in the libel, which he ought to answer, he was formerly held to be in contumacy, and was excommunicated and denounced before the King in Chancery, and was further apprehended and detained in custody, till he should answer, and also rendered subject to the payment of a penalty, which was usually distributed as a charity by the Judge among the poor prisoners.[1] But the present practice seems to be, when a party, cited to answer, neglects or refuses, to issue a citation *viis et modis* against him; and if he still neglects, a citation issues to his bail to produce him, and if they do not appear and make excuse, they are declared contumacious, and a decree is rendered, and process issues to apprehend them.[2]

By the rules[3] of the Circuit Court of the United States for the First Circuit, in civil causes of Admiralty and maritime jurisdiction, if either party be decreed to give a person-
al answer, and refuse or neglect so to do, such party 206
shall be deemed in contumacy and default; and, if the party be plaintiff, the suit shall be dismissed; if defendant, the allegations in the libel shall be taken for confessed, and the Court will thereupon hear the cause and judge the same *ex parte*. But, if the other party prefer, he may proceed by attachment to compel an answer.

By the rules (*a*) of the District Court of the United States

[1] Law's Eccl. Law, 199; Hall's Ad. Prac. 52; Clerke's Prax. Tit. 24.
[2] 2 Bro. Civ. and Ad. Law, 417. [3] Rule 20.

(*a*) See Rules 35, 89, 96, 97, 98, 101, Rules of 1838, Southern Dist. N. Y. Also, see New Rules U. S. Supreme Court, 28, 29, 30, 31.

for the Southern District of New York, it is required that the claim, or answer, be filed with the Clerk on the return day of the process, or within such further time as the Court, on cause shown, may allow; and the entering of the default excludes all claims or answers from being afterwards filed, except by special leave of the Court. The libellant may, within ten days from filing of the answer or claim, file exceptions thereto, for insufficiency or for irrelevant matter, which exceptions should briefly and clearly specify the parts excepted to, by the page and line of the papers in the Clerk's office; whereupon the party answering or claiming shall, in four days, either give notice to the libellant of his submitting to the exceptions as well taken, or set down the exceptions for hearing, and give four days notice thereof, for the earliest day of jurisdiction afterwards. If the party submit to the exceptions as well taken, he will be required to answer further within four days after notice of his submitting; if the exceptions are allowed on a hearing, he will be required to answer further within such time as the Court shall direct; and, if the hearing of the exceptions be not duly brought on, or the further answer duly put in, the claim or answer excepted to shall be treated as a nullity, and the defaults of the party be entered. If the exceptions be submitted to or allowed by the Court, or the hearing be not duly brought on, the matter excepted to will be struck out of the claim or answer by the Clerk. The answers to interrogatories may be excepted to in the same manner, and are subject to the same rules.

By the general rules of proceedings in Admiralty causes,

the answer may be required upon oath.[1] But the oath cannot be required when the party might be compelled thereby to charge himself, or confess or purge himself of any crime or breach of any penal law.[2] The rules[3] (a) 208
of the Circuit Court of the United States for the First Circuit, in civil cases of Admiralty and maritime jurisdiction, give the plaintiff a right to require the personal answer of the defendant on oath to interrogatories, filed or to be filed by him in Court, touching the allegations contained in the libel; but an answer will not be required, when it will expose the party to a penalty, forfeiture, or punishment for a crime. In the District Court of the United States for the District of Massachusetts, answers are not required to be on oath, unless at the instance of the plaintiff; and it is often expedient for the plaintiff not to require the answer to be on oath; but, by the rules[4] of the District Court of the United States for the Southern District of New York, no claim or answer can be received, unless sworn to.

The party, whose oath is required, is bound to appear personally in Court, or before a commissioner appointed by the Court, to take his oath to his pleading. When this indulgence is granted for the advantage of the party whose oath is to be taken, the expense falls upon him by the general usage of the Ecclesiastical Courts in 209
England. But, when his absence is involuntary, the

[1] Law's Eccl. Law, 187; 2 Bro. Civ. and Ad. Law, 416.
[2] Law's Eccl. Law, 187, *note*; 3 Burns' Eccl. Law, 5. [3] Rules 17, 19.
[4] Rule 18. See New Rules of the U. S. Supreme Court, Rules 26, 27.

(a) See New Rules of the U. S. Supreme Court, 32.

expense does not ordinarily fall upon him. When a decree for answers has been executed, the party will not, where it may be attended with considerable inconvenience, be required to appear for any further proceedings, but the Court will direct a commission to certain individuals to receive the additional answers.[1]

In the Admiralty Courts of the United States, the answers are taken according to the direction of the Court; generally in Court, and sometimes before the Clerk, or commissioner, and the expense is decreed in the discretion of the Court.

Answers, in courts of the Civil Law, are required to be on oath; and it is said, by a very eminent American Admiralty Judge, that an answer of a claimant on the instance side of the Admiralty should be upon oath.[2] (*a*) This is generally the practice in cases *in rem*, in order to establish the claimant's right to defend; and, where the claim and answer are frequently joined in one proceeding.

The truth of pleading is always assumed in the Ad-
210 miralty practice, in considering its admissibility, unless there is involved some strong contradiction in the representation.[3]

Sometimes the cause can be decided upon the allegations and admissions contained in the libel and answer. But, when other proceedings become necessary, evidence must be obtained from witnesses and documents, and the cause is set down for proof.

[1] Law's Eccl. Law, 186, *note.* [2] Gammell *v.* Skinner, 2 Gall. R. 45.
[3] The Neptune, 1 Hagg. R. 231.

(*a*) New Rules of the U. S. Supreme Court, 26, 27; Coffin *v.* Jenkins, 3 Story R. 121.

CHAPTER IX. 211

AMENDMENTS.

AMENDMENTS, both in matters of form and substance, in the proceedings in an Admiralty suit, are very liberally allowed.[1] (*a*) They are made by supplying omissions, retrenching superfluous allegations, completing imperfect averments, distinguishing things confused, and declaring things obscure.[2] Amendments are allowed, in the Admiralty Courts of the United States, whenever the justice of the case requires them. No proceedings in civil cases, in the Courts of the United States, can be reversed for want of form, unless the defect be specially demurred, or excepted to; and, in all cases, amendments may be made of any defects of form, by leave of the Court in its discretion, and according to its rules, although such defects may be specially demurred or excepted to.[3]

If an error occurs in the name of either of the par- 212
ties, and the error is apparent from the instrument or process, or from acts of Court done in the cause, the proctor may obtain leave, on motion, to make an amendment.[4] A

[1] The Caroline, 7 Cranch R. 496; The Ann, ibid, 570; The Adeline, 9 Cranch R. 244; The Divina Pastora, 4 Wheat. R. 52; The Harmony, 1 Gall. R. 123; Orne *v.* Townsend, 4 Mason R. 541.

[2] Law's Eccl. Law, 159. [3] Act of Cong. 1789, ch. 20, § 32.

[4] Law's Eccl. Law, 164.

(*a*) See Rule 24, New Rules of the U. S. Supreme Court.

decree or order for the amendment of a mere literal error may be, and usually is, interposed by the Judge; but, if the mistake is apparent from the libel or process, the revocation by an act of Court, made by the proctor, is sufficient.[1] In the English Ecclesiastical Courts, the form of this act of Court, usually adopted, is as follows,—and it may be modified to meet many cases of amendments: "I allege, that, through a mistake of the writer of the libel (or other instrument or matter given in by any party), the name (John), or the word (naming the word in which, and the sentence where, the error occurs) were written and inserted in such an article or position of the said libel (or other matter or allegation), and are to be found in such a line of the same (reckoning, as the case may be, from the top or bottom of the page), whereas the word or name (Thomas), or this word (*), or these words (* * *), should have been inserted and inscribed;
213 as evidently appears from the document itself, and from other acts had, sped, and done in the cause to which I refer myself. Wherefore, for all purposes of law, I revoke and withdraw the error, and pray that it may be considered as revoked and withdrawn; and in place of the word or name (John), or some other words (* * *), I pray that the name (Thomas) may be inserted, or the word (*), and the same of other words erroneously written."

Then the Judge says, "We decree accordingly."[2]

There is, in the Civil Law Courts, an amendment allowed, which is called a mutation of libel. This is where there is an alteration of the substance of the libel, as by the propounding a new cause of action, or where one thing is

[1] Law's Eccl. Law, 165. [2] Ibid, 164.

asked instead of another.[1] Where the statute of limitations would run against a cause of action, then before the Court, it is held a good reason for allowing an amendment as to such cause of action; but, in such a case, an amendment will not be allowed to introduce a new substan- 214
tive cause of action.[2] It is not a valid objection to the allowance of an amendment in a proceeding *in rem*, that the rights of sureties may be affected; for every person bailing the property is considered as holding it subject to all legal dispositions by the Court; and this is the settled doctrine of Courts exercising Admiralty jurisdiction.[3]

Where a libel is so informal and defective that the Court cannot enter a decree upon it, and the evidence shows a case of forfeiture, the Supreme Court of the United States will not amend the libel, but will remand the cause to the Court below, with directions to permit amendments.[4]

In Admiralty proceedings, the parties are permitted, whenever the substantial merits and justice require it, to introduce new allegations and new proofs; *non allegata allegare, et non probata probare;* but, where the amendment is made in the Circuit Court, on appeal from the District Court, the cause is heard and adjudicated by the former; and, upon appeal from the Circuit Court, by 215
the Supreme Court, on the new allegation; but, if the amendment is allowed by the Supreme Court of the United

[1] Law's Eccl. Law, 165, 166, 167; The Cordelia, U. S. Dist. Ct., Mass. Dist., Sept. Term, 1830; United States *v.* Woollen Cloth, 1 Paine R. 435; The Harmony, 1 Gall. R. 123; The Edward, 1 Wheat. R. 261.

[2] The Harmony, 1 Gall. R. 125. [3] Ibid.

[4] The Mary Ann, 8 Wheat. R. 380.

States, the cause is remanded to the Circuit Court, with directions to permit the amendment to be made.[1]

By the rules[2] of the Circuit Court of the United States for the First Circuit, it is provided, that, in all suits of Admiralty and maritime jurisdiction, amendments in matters of form may be had at any time, on motion, as of course. And new counts may be filed, and amendments in matters of substance may be had, upon such terms as the Court shall impose, at any time before the final decree. And, if any defect of form be set down upon special demurrer or exception, the Court may, in granting the amendments, impose terms.

[1] The Marianna Flora, 11 Wheat. R. 1. [2] Rule 1.

An appellee in Admiralty may amend the libel he has filed in the District Court, so as to make a claim in the appellate Court for damages above costs caused by a vexatious appeal.—Weaver *v.* Thompson, Wallace Jr. R. 343.

CHAPTER X. 216

THE PROOF.

It is not within the proposed limits of this work to treat upon the whole subject of evidence in civil causes of Admiralty jurisdiction. An attempt of this nature, even upon a limited plan, would require a treatise upon the doctrines of evidence at Common Law, and according to the Civil Law; for most of the principles of both systems of jurisprudence are familiarly applied in Admiralty suits, in the Courts of the United States. The essential rules of evidence, however, are the same among all nations governed by reason, although the technical rules may vary.[1] This chapter will be devoted to the consideration of the mode of taking the evidence, and will contain a notice of some of the most important peculiarities in the practice of the Admiralty Courts on this subject.

One source of information and evidence is the parties to the suit; for, as has been before stated, either party may appeal, in any stage of the cause, before its con- 217
clusion, to the conscience of his adversary, and compel him to answer interrogatories respecting any matter pertinent to the cause.

In the British Courts of Admiralty, when the pleadings are closed, a time for taking the testimony is assigned, which is called a term probatory. Within this term the testimony

[1] 2 Bro. Civ. and Ad. Law, 371.

must be taken, and a reasonable time is allowed for this purpose; and either party may examine his witnesses, for the term probatory is common to both parties. Until the expiration of the term probatory, and the publication of the depositions, the whole cause, with all the allegations contained in the pleadings, is open to proof.[1] When good cause is shown, the term will be enlarged; and when it is lapsed, and the benefit lost without the fault of the party, it will on special cause be restored.[2]

If the witnesses, upon being duly summoned, do not appear, to be examined, a decree issues, if they have not been and cannot be personally summoned, for a citation *viis et*
modis. If they do not appear, upon the execution of
218 the process, a warrant of compulsory process issues for
their apprehension.[3] The probatory term is enlarged, in all cases, when it may be necessary, in consequence of the neglect or contumacy of witnesses, until the testimony can be obtained.[4] But, if the neglect or contumacy be occasioned by collusion with either party, the Judge will proceed to assign a time for sentence; but, upon the appearance of the witnesses, and upon the contempt being explained and purged before sentence, they may, in the discretion of the Court, be examined.[5]

When the witnesses are produced, within the period of the term probatory, they are sworn in Court.[6] If they reside at a distance, a commission usually issues to commissioners to swear and examine them. If the witnesses are produced and sworn, within the term probatory, they may be exam-

[1] 2 Bro. Civ. and Ad. Law, 418, 419. [2] Ibid.
[3] Ibid, 419, 420. [4] Ibid. [5] Ibid. [6] Ibid.

ined after it has expired. Upon their being produced they are sworn, and if the adverse party intends to cross-examine them, he causes them also to be sworn to answer the interrogatories, which may on his part be propounded. The witnesses are usually, when sworn, admonished by the 219
Court to attend the examiner, who will give suitable notice of the time and place of examination. The party producing the witnesses, is required to give notice to the other party, of the articles in his pleading, respecting which he intends to examine them.[1]

The witnesses are common to both parties, and the cross interrogatories, of which, it is said, a copy need not be given to the opponent, must be filed in twenty-four hours, unless longer time be obtained by the indulgence of the Court. Each party may read the testimony of his own witnesses, as well as those of his adversary on cross-examination.[2]

A party cannot impeach his own witnesses; but it is said, that cross-examination does not preclude the impeachment of the witness of an opposing party.[3] It is remarked, in a work of high authority in the Ecclesiastical Courts, that cross-examining a witness sets him upright before the Court, so that the party afterwards cannot except to his credibility; but he may to his competency, if it should come out that he is interested, or the like.[4]

The witnesses are examined by the examiners or 220
commissioners, and not in the presence of each other, or of the parties.

When the deposition is completed, it is carefully and

[1] 2 Bro. Civ. and Ad. Law, 420. [2] Ibid. [3] Ibid.
[4] 2 Burns' Eccl. Law, 241, Tit. Evidence, § 5.

distinctly read over to the witness, and he is asked if there be any thing which he wishes to alter or amend, and an opportunity is offered to make corrections of any errors in his testimony. The witness is also asked in open Court when the deposition is read, whether there is any thing which he wishes to correct. This is said to be necessary because the examination is presumed to be in the presence of the Judge.[1] The author of the learned work, so often cited in this treatise, on the Civil and Admiralty Law, considers this preferable to the *nisi prius* practice in the Courts of Common Law, when he says, "Every incautious or hasty expression of a witness is instantly bellowed to the jury, and insisted upon, without giving time to the witness to correct a particle, or, if he attempts to do it, perjury or prevarication is immediately charged upon him."[2]

If the witnesses are unable, from great age, imprisonment, infirmity, or sickness, to attend Court to be 221
sworn, although resident at the place of holding the Court, the Judge, or his surrogate, or the usual examiner, will attend and examine them at their own houses. If they reside at a distance, but within the jurisdiction of the Judge, a commission issues for their examination. But when they do not reside within the jurisdiction of the Judge, Letters Rogatory are sent to the Admiralty Judge, within whose jurisdiction they are, requesting him to cause them to be examined upon the interrogatories filed in the cause *sub mutuæ vicissitudinis obtentu.* Commissioners are also sent, in common form, to foreign countries, authorizing persons to take the examinations of witnesses there residing.[3]

[1] 2 Bro. Civ. and Ad. Law, 421. [2] Ibid, *note.* [3] Ibid, 422.

Letters Rogatory are proceedings derived from the Civil Law, and recognised in the Law of Nations.

As it is the duty of Courts, when the Law of Nations is peculiarly administered, to aid each other in the discovery of truth, so it is the custom of the Judges of such Courts, to invoke the aid of each other, when the testimony of witnesses, residing beyond the jurisdiction of the Judge, before whom the cause is to be tried, may be required. 222 Letters Missive, either open or closed, under the hand of the Judge, and the seal of his Court, are sent to the Judge of the Admiralty Court, within whose jurisdiction the witnesses reside whose testimony is needed. These Letters Missive state, that there is a cause pending between the parties named, in which the testimony of the witnesses named is essential; that they reside within the jurisdiction of the Judge, to whom the Letters Rogatory are addressed; and he is requested to cause them to be examined upon the interrogatories accompanying the Letters, and to transmit their examination to the Judge of the Court whence the Letters issued. Upon the receipt of Letters Rogatory by an inferior Court of Admiralty, the witnesses are summoned and required to appear before the Judge, their depositions are taken by him, and recorded in the Registry of the Court, and authenticated copies are transmitted to the Court which sent the request.

In Letters Rogatory there is always an offer, on the part of the Court whence they issued, to render a mutual service to the Court to which they may be directed, whenever required. When the Letters Rogatory are sent to a Supreme Court of Admiralty, examiners are usually ap- 223

pointed, and the same proceedings pursued as in other cases. This course of proceeding is of great advantage; as the witnesses will be compelled to attend by the Court of Admiralty upon the receipt of the Letters Rogatory, and thus Courts of Admiralty are enabled to obtain the testimony, which may be essential to the just decision of the cause, from any country where a similar Court is established. In ancient times, the Judges of the Courts of Common Law in England availed themselves of the advantage of Letters Rogatory.[1]

The examiners, or commissioners, for taking the depositions within the jurisdiction, are such persons as the Judge pleases to appoint, generally some officers of the Court; and the commission is generally directed to them jointly and seve-
224 rally, requiring them to examine the witnesses during the term probatory, and to return their doings into Court.

The practice of appointing examiners, named by the parties, which has sometimes existed, is reprobated, as having a tendency to prevent impartiality in the taking the depositions, and to create disputes among the examiners, who are said to be too much inclined to exhibit the feelings of the parties who appoint them.[2] The adverse party may join in the commission to take testimony, in order to save expense, and examine his own witnesses. If a party do not wish to attend,

[1] 1 Rolle's Abr. 530, pl. 13; Hall's Ad. Prac. 37.—It has been regretted that the principle of the Civil Law, with respect to Letters Rogatory, has not been introduced into the practice of the Courts of Common Law. Commissions of *Dedimus potestatem* have been considered a feeble substitute. In *Nelson* v. *United States*, (Peters C. C. Rep. 236,) will be found a copy of Letters Rogatory issued to the Courts of Havana, according to the form and practice of the Civil Law, on an occasion when the authorities there had prevented the execution of a commission, regarding any attempts to take testimony under it, as an interference with the rights of the Judicial Tribunals of that place. [2] 2 Bro. Civ. and Ad. Law, 423.

either personally or by his proctor, at the arrangement and speeding of the commission, he may deliver to the Register his interrogatories, which are not to be shown till the commission shall be opened; but he may afterwards be present by his proctor, withdraw these interrogatories, and substitute others. If interrogatories are not previously prepared, the commissioners generally allow a reasonable time to propose them, though strictly only twenty-four hours are allowable.[1]

If the adverse party neglect to appear at the time of the arrangement and speeding of the commission, 225 he is to be thrice publicly called; and it is said, that, if he do not choose to be present, he should, at the time of granting the commission, state what grounds of protest he may have against the witnesses, as otherwise he cannot afterwards except against them.[2]

When a commission in common form issues to take testimony abroad, it is commonly directed to the principal Magistrate, or his Deputy, of the place where the depositions are to be taken; and the commission is required to be executed between certain days named, giving reasonable notice to the adverse party.[3]

The commission to take the testimony in an Admiralty cause being duly executed, it is returned to the Court, with a certificate of all the proceedings, signed by the examiners. Every leaf of the depositions is subscribed by the deposing witness, and the whole is sealed up under an authentic seal, which is not to be broken until the commission and proceedings shall be produced in Court, and then opened, upon prayer or motion.[4]

[1] 2 Bro. Civ. and Ad. Law, 423. [2] Ibid. [3] Ibid, 425. [4] Ibid.

When the pleadings are closed, if neither party
226 intends to produce and examine any more witnesses,
either may pray publication, saving, on special circumstances, the examination of some particular witness.[1] It may, however, be stayed on sufficient cause shown by the adverse party, and putting in a new pleading, if he have a right so to do; for publication cannot pass till the pleadings are exhausted, and the witnesses to them examined. But the party must be ready with his new pleading at the time; for the Court will determine whether publication be unreasonably or designedly delayed, or a commission tediously or improperly executed, and decide accordingly.[2]

After publication of testimony, an exceptive allegation may be made to the evidence of a witness founded on his subsequent affidavit, contradicting his former testimony; for though such declarations are suspicious, they are not excluded.[3]

Publication having passed, and the copies having been given out, if the witnesses have not answered the interrogatories fully, they will be required to give more full answers.

Exceptions to the witnesses may now be presented.
227 These may be general, offering general objections; or
they may be special, specifying particular facts, causes, and reasons of exception. Exceptions may be to their persons, as that they are of infamous character, or to their sayings, that they are contradictory, or repugnant, or extra-articulate.[4] The other party may require, it is said, an oath, from the party preferring exceptions, that he doth not except for the sake of

[1] 2 Bro. Civ. and Ad. Law, 425.
[2] Ibid, 425, 426.
[3] The Centurion, 1 Hagg. R. 161.
[4] 2 Bro. Civ. and Ad. Law, 426.

delay. Probatory terms are granted on such exceptions and considerations for the taking of testimony, as in the principal cause.[1]

Where general exceptions to witnesses are filed, and a probatory term is assigned, and afterwards additional special exceptions are filed, an additional probatory term will not be granted; but the evidence, in the support of these exceptions, must be taken within the term assigned for proof in support of the general exceptions.[2]

The party whose witnesses are excepted to may corroborate them, and impeach the witnesses in support of the exceptions. He may reprobate those by whose testimony his original witnesses are reprobated. But the contest can go no farther; *in testem testes, et in hos; sed non da-* 228
tur ultra.[3] The party excepting may also corroborate his witnesses; but corroboration cannot aid those against whom specific objections have been preferred.[4]

Besides the evidence obtained by the testimony of witnesses, that of solemn instruments and written documents, in which there is no danger of perjury, is admissible. If referred to in the pleadings, they ought to be produced before the contestation of suit. But they are sometimes permitted to be produced and filed as exhibits at the hearing of the cause. If instruments to be used in evidence are in a foreign language, they should be interpreted by persons skilled and sworn to make a correct translation, copies of which should be deposited with the Register. In this case, the proctor of the party offering the instrument usually

[1] 2 Bro. Civ. and Ad. Law, 426.
[2] Hall's Ad. Prac. 92.
[3] 2 Bro. Civ. and Ad. Law, 427.
[4] Ibid.

states that he exhibits it, and moves that a skilful interpreter be appointed to make a faithful translation, and to return the original with the translation into Court on a certain day. The Judge appoints and swears some skilful person, and admonishes him according to the motion.[1]

229 The translation having been made and returned with the original into Court, the proctor exhibits them, and alleges that the instrument contains the truth, and that the translation is correct. He may then make oath that he has faithfully propounded the instrument, and may require the oath of the proctor on the other side as to his belief in the allegations. If the proctor on the other side answers on oath, that he does not believe the allegations, the personal answer of his client may be required; and the proctor prays that the copy may be registered, and the original returned; but he must leave on file the original until the personal answers required are obtained.[2]

Instruments are of two kinds, public and private.

Public instruments are those which are made by public persons. And of these, there are many sorts; five of which are commonly observed.

1. An instrument drawn under the hand of a Notary Public, or other public person, either in or out of Court.

2. That which is sealed with some public or authentic seal (though written by a private), as of a Prince, City, University, or College.

3. All writings whatsoever (though private) which are exemplified by the authority of the Judge, or Magistrate.

[1] Clerke's Prax. Tit. 50; 2 Bro. Civ. and Ad. Law, 427.
[2] Clerke's Prax. Tit. 51; Hall's Ad. Prac. 97.

4. All such writings as are taken out of public 230
registries, &c., or those made at the public acts, [that is to say, *matters of record.*]

5. Those writings which are subscribed by the person and witnesses. And this is public as to its effects.

Private instruments are such as are made without any solemnity; and they are either

1. Accounts.

2. Private inventories, or registers; or

3. Private letters betwixt one friend and another, one tradesman and another.[1]

The following laws have been passed by Congress on the subject of evidence, which apply to proceedings in the Courts of the United States, in the trial of civil causes of Admiralty jurisdiction.

All the Courts of the United States shall have power, in the trials of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in Chancery; and
if a plaintiff shall fail to comply with such order to 231
produce books or writings, it shall be lawful for the Courts, respectively, on motion, to give the like judgment for the defendant as in cases of non-suit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the Courts, respectively, on

[1] Hall's Ad. Prac. 98.

motion as aforesaid, to give judgment against him or her by default.[1]

The mode of proof by oral testimony, and examination of witnesses in open Court, shall be the same in all the Courts of the United States, as well in the trial of causes in equity, and of Admiralty and maritime jurisdiction, as of actions at Common Law. And when the testimony of any person shall be necessary in a civil cause depending in any District, in any Court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such District, and to a greater distance from the place of trial, than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*,
232 before any Justice or Judge of any of the Courts of the United States, or before any Chancellor, Justice, or Judge of a Supreme or Superior Court, Mayor, or Chief Magistrate of a City, or Judge of a County Court or Court of Common Pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he thinks fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays

[1] Act of Cong. 1789, ch. 20, § 15.

exclusive, for every twenty miles travel. And in causes of Admiralty and maritime jurisdiction or other cases of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons, circumstanced as aforesaid, shall be taken before a claim be put in, the like notification, as aforesaid, shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, 233 and sworn or affirmed, to testify *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the Magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such Magistrate, until he deliver the same with his own hand into the Court for which they are taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any given, to the adverse party, be by him, the said Magistrate, sealed up and directed to such Court, and remain under his seal until opened in Court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in Court. And in the trial of any cause of Admiralty or maritime jurisdiction in a District Court, the decree in which may be appealed from, if either party shall suggest to and satisfy the Court, that probably it will not be in his power to produce the witnesses, there testifying, before the Circuit Court, should an appeal be had, and shall move that their testimony be taken down in writing,

it shall be so done by the Clerk of the Court. And
234 if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the Court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the Court is sitting; or that, by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at Court; but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause: *Provided*, That nothing herein shall be construed to prevent any Court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice; which power they shall severally possess; nor to extend to depositions taken *in perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any Court of the United States, a Circuit Court, on application thereto made as a Court of Equity, may, according to the usages in Chancery, direct to be taken.[1]

235 Subpœnas for witnesses who may be required to attend a Court of the United States, in any district thereof, may run into any other district: *Provided*, That, in civil causes, the witnesses living out of the district in which the Court is holden, do not live at a greater distance than one hundred miles from the place of holding the same.[2]

[1] Act of Cong. 1789, ch. 20, § 30. [2] Act of Cong. 1793, ch. 66, § 6.

In any cause before a Court of the United States, it shall be lawful for such Court, in its discretion, to admit in evidence any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a Court of the State wherein such cause is pending, according to the laws thereof.[1]

In case of the District Judge, in any district, being unable to discharge his duties, the District Clerk of such district shall be authorized and empowered, by leave or order of the Circuit Judge of the circuit in which such district is included, to take, during such disability of the District Judge, all examinations and depositions of witnesses; and make all necessary rules and orders preparatory to the final 236
hearing of all causes of Admiralty and maritime jurisdiction.[2]

It shall be lawful for the Circuit Court of the United States, to be holden in any district in which the present provision, by law, for taking bail and affidavits in civil causes, (in cases where such affidavits are, by law, admissible,) is inadequate, or, on account of the extent of such district, inconvenient, to appoint such, and so many, discreet persons, in different parts of the district, as such Court shall deem necessary, to take acknowledgments of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect, as if taken before any Judge of said Court. And any person swearing falsely, in and by any such affidavits, shall be liable to the same punishment, as if the same affidavit had been made or taken before a Judge of said Court. The like fees shall be allowed for taking such bail and affidavit, as are allowed for the like services, by the laws

[1] Act of Cong. 1812, ch. 25, § 3. [2] Act of Cong. 1809, ch. 94, § 3.

of the State in which any such affidavit or bail shall be taken.[1]

The commissioners, who now are, or hereafter may
237 be appointed, by virtue of the act entitled "An Act for the more convenient taking of affidavits and bail in civil causes, depending in the Courts of the United States," are authorized to take affidavits and bail in civil causes, to be used in the several District Courts of the United States, and shall and may exercise all the powers that a Justice or Judge of any of the Courts of the United States may exercise by virtue of the thirtieth section of the act, entitled, "An Act to establish the judicial Courts of the United States."[2] (a)

Seamen, having like cause of complaint, are required, by the laws of the United States, in a prosecution against the ship to enforce the payment of their wages, to join in the suit.[3] But their respective claims are considered in many respects as distinct actions, and there are distinct decrees on each claim.[4] It would seem reasonable that they should be considered competent witnesses for each other, although all are joined as parties in one libel; but, in some of the Admiralty Courts of the United States, they have not been so considered. It is said to be settled in the District Court of the United States for the Eastern District of Pennsylvania,
238 that one seaman cannot be a witness for another, if the witness and party have a common interest in the point in contest, as when the question is the loss of the ship, embezzlement, misfeasance, malfeasance, or negligence, to

[1] Act of Cong. 1812, ch. 25, § 1, 2.
[2] Act of Cong. 1817, ch. 203.
[3] Ante p. 95.
[4] Ante p. 101.

(a) See Appendix—Act of Congress, Aug. 23, 1842.

which all must contribute in damages; but when, though the contracts be similar, the breach or performance of one may happen without affecting the other; when special indulgences are given to one, though not to all the rest, one seaman may be a witness for another. When they are involved in similar breaches of contract, although the agreements be separate and independent, though competent witnesses, they are heard with caution.[1] The same Court, subsequently, in commenting upon these doctrines, observed, that mariners, joined together in one libel, were never permitted to be witnesses for each other; because seamen voluntarily connect themselves in a libel, and, therefore, do not stand upon the same ground, as at Common Law.[2]

In suits at Common Law, upon shipping articles, which are always several agreements, not a joint con- 239
tract, seamen are competent witnesses for each other, although the witness and party have a common interest in the question in dispute. The objection on this ground, however, weighs against the credit, not the competency of the witnesses.[3] Although the witness have an interest in the question, if he be not interested in the event of the suit, it is not an objection to his competency; and this is according to the rules of the Common Law, the Civil Law, and the maritime law.[4]

In the District Court of the United States for the District of Massachusetts, it has been the practice, in suits in the

[1] The Philadelphia, 1 Peters Ad. R. 211.

[2] The Ship Betsey, 2 Brown's Penn. R. 350.

[3] Hoyt *v.* Wildfire, 3 Johns. R. 510; Spurr et al. *v.* Pearson, 1 Mason R. 104; 1 Phillips on Ev. 38, and *note* (1st Am. Ed.).

[4] Spurr et al. *v.* Pearson, 1 Mason R. 104.

Admiralty for seamen's wages, to obtain permission from the Court, to strike out of the libel, or to omit in instituting the suit, those parties whose testimony may be required. But, in the District Court of the United States for the Eastern District of Pennsylvania, this seems to be considered as objectionable.[1]

In the Supreme Court of the United States it has
240 been decided, that the contracts of the seamen in shipping articles are distinct; that one seaman does not contract jointly with, or bear any responsibility for, another; that the contract is so considered in the Act of Congress for the government of seamen in the merchants' service; that, though the libel be joint in form, the contract is always treated as a distinct contract with each seaman; that their defences are distinct; that the decree should assign to each seaman, severally, the amount to which he is entitled, and dismiss the libel as to those who have no right; and that the whole of the proceeding, though in the form of a joint suit, is, in fact, a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract; and that it is "a positive obligation," that the seamen, suing *in rem* for their wages, should join in the libel.[2]

One of the objections to the competency of a party, as a witness at Common Law, is, interest in the event of a suit in damages and costs. In the Circuit Court of the United States for the Third Circuit, it was held, that a plain-
241 tiff, in a cause at Common Law, might be examined as a witness, who assigned all his interest in the suit to

[1] The Ship Betsey, 2 Bro. Penn. R. 350.

[2] Oliver et al. *v.* Alexander et al. 6 Pet. Sup. C. R. 143; Penhallow et al. *v.* Doane's Administrators, 3 Dall. R. 73.

his co-plaintiff, and who was released by him from all claim for costs, a sufficient security for the defendant's costs having been given. The Court considered, that, as the interest, which the party has in the event of the suit, both as to costs, and the subject of dispute, lies at the foundation of the rule, when that interest is removed, the objection ceases to exist.[1]

But, when seamen sue in the Admiralty *in rem*, for the recovery of their wages, one seaman has no interest in the amount, which another may recover; and the subject of costs is entirely in the discretion of the Court, so that they may be moulded and arranged, when the justice of the case may require it, in such a manner as to relieve the witness from the objection of interest, founded on that consideration.

It is not known, that there has been any express decision of this question respecting the admission of a seaman, libellant *in rem* for wages, as a witness; but it is suggested whether the point may not properly be made and submitted to the consideration of the Superior Courts of Admiralty in the United States, notwithstanding the 242
weight of the authority, and present practice, against the admission of one of the libellants as a witness for the others.

Seamen, like other persons, if not interested or infamous, are competent witnesses in the trial of criminal, as well as civil, causes. The law has pronounced no general sentence of exclusion against them, and there is nothing in their course of life or general character, which will warrant such

1 Willing et al. *v.* Consequa, Pet. C. C. R. 301.

a harsh and vindictive proceeding; their testimony is to be weighed, and is open to every suggestion arising from their individual characters, the manner of testifying, the nature of the facts related by them, their prejudices, passions, and feelings, and all the considerations, which abate the force of evidence in every other case.[1]

A libellant's father, who had made advances, and become responsible, for the expenses in a seaman's suit for wages, was rejected as a witness in the High Court of Admiralty in England.[2]

The master of a ship has been considered an incompetent witness, in suits against the ship or the owners for
243 seamen's wages, on account of his liability for their wages. This has often been held in the District Court of the United States for the Southern District of Pennsylvania, upon the ground of the master's interest to throw off the responsibility for the wages imposed upon him by law.[3] (*a*) He is considered interested and incompetent, because if a decree passes in a procedure *in rem*, or against the owner, it may be given in evidence, to repel a suit against the master.[4] In the Supreme Court of the State of Pennsylvania, it was decided, that the master of the ship, in a suit by the mate against the owners, was not a competent witness for them to establish the propriety of the discharge

[1] U. States *v.* Freeman, 4 Mason R. 505.

[2] The Harvey, 2 Hagg. R. 83, *note.*

[3] The Phœnix, 1 Pet. Ad. R. 201; Atkyns *v.* Burrows, ibid, 244; Malone *v.* Bell, ibid, 139.

[4] Malone *v.* Bell, 1 Pet. Ad. R. 139.

(*a*) The William Harris, Ware R. 371.

of the plaintiff in a foreign port without a release; and a question was made, whether the release should not be from all the owners.[1] In the High Court of Admiralty in England, the master of a ship was held an incompetent witness to establish the charges of incapacity, neglect, drunkenness, and disobedience of orders by the mate, in a suit by the latter, for his wages, against the ship.[2] But, in the 244 same Court, an objection to his competency in support of a defensive allegation in opposition to the claim of a seaman for wages, in a suit against the owners of the ship, was overruled, upon the ground that there was no general objection to the competency of the master, although his testimony should be received with caution; and it was said, that, the seaman having an election to proceed against the owners, the master, or the ship, and having instituted proceedings against the ship, the master had no immediate interest in the suit, and was a competent witness.[3] Upon the authority of this decision, a master was admitted in a peculiar case, in the District Court of the United States for the District of Massachusetts, by a seaman against the ship, to establish the fact that the libellant had been guilty of smuggling in a foreign port, and that the master had paid a gratification to a Custom House officer, in order to prevent an information; which sum the owners, who offered abundant security for the payment of all that the libellant could recover, claimed to deduct from the wages. But, generally, the master of a ship is not received as a competent 245

[1] Galloway *v.* Morris et al., 3 Yeates R. 445.
[2] Robinett *v.* The Ship Exeter, 2 Rob. R. 262.
[3] The Lady Ann, Edwards Ad. R. 235.

witness in defence in a suit against the ship or owners by a seaman for wages, in the District Court of the United States for the District of Massachusetts.

The master of a ship cannot be a witness, without a release from the owners, to defeat a suit grounded on his alleged misconduct.[1] (*a*) He is not competent, by his testimony, to exempt the ship libelled for a forfeiture, occasioned by his own illegal conduct; since he has a direct interest in the event, and the decree of condemnation would be good evidence against him in a suit by the owners.[2] A release by the owners would perhaps sustain his competency, but the objection to his credit would press very strongly.

The Act of Congress, for the government of seamen in the merchants' service, requires every master or commander of any ship or vessel bound from the United States to any foreign port, or, if the vessel exceed fifty tons, bound from a port in one State to a port in any other than an ad-
246 joining State, before proceeding on such voyage, to make an agreement in writing or print, with every seaman except such as shall be an apprentice or servant to himself or owners, declaring the voyage or voyages, term or terms of time, for which such seaman shall be shipped.[3] (*b*)

[1] Bird *v.* Thompson, 1 Esp. R. 337. [2] The Hope, 2 Gall. R. 48.
[3] Act of Cong. 1790, ch. 56, § 1.

(*a*) The Nymph, Ware R. 257.

(*b*) By the Act of Congress, July 20, 1840, ch. 48, § 10, all shipments of seamen contrary to the provisions of that and other acts of Congress, shall be void; and any seamen so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.—5th Vol. Stat. at large, page 395.

When stipulations against justice and the marine law are inserted in the shipping articles, the Admiralty will relieve the seamen who are particularly under its protection; and this is its known rule of practice, in considering these special contracts, founded on the equitable nature and constitution of the Court.[1](a) In the Supreme Judicial Court of the State of Massachusetts, it has been decided, that if a seaman in any case sign an unreasonable contract, in which new and extraordinary stipulations are inserted, the Court will relieve him.[2] The words "or elsewhere," in shipping articles, are not to be taken in an indefinite latitude as to space and time, a universal *alibi* for the whole world, including the most remote and pestilential shores. They must receive a reasonable construction, varying much according to the situation of the primary port of destination.[3] 247 In the Circuit Court of the United States for the First Circuit, these words in shipping articles have been held to be either void for uncertainty and generality, or subordinate to the principal voyage named.[4] Shipping articles, under the British statutes, are conclusive only in relation to the description of the voyage and the stipulated wages, but not

[1] The Minerva, 1 Hagg. R. 358; Harden *v.* Gordon, 2 Mason R. 541; Abbott on Ship. 434, *note* (4th Am. Ed.).

[2] Millot *v.* Lovett, 2 Dane's Abr. 461.

[3] The Minerva, 1 Hagg. R. 361; The Countess of Harcourt, 1 Hagg. R. 248; The George Homer, ibid, 370.

[4] Brown *v.* Jones et al., 2 Gall. R. 477; 1 Am. Law Journal, 209.

(a) Stipulations in shipping articles disadvantageous to the mariner are void.—Brown *v.* Lull, 2 Sumner R. 443.

with respect to special and unusual stipulations.[1] The mariner's contract is an ancient contract, and there are two essential stipulations, one on the part of the owner describing the voyage, the other on the part of the seaman engaging for his rate of wages.[2] The shipping articles, in respect to the wages of the master and his apprentice, are *primâ facie* evidence importing verity; but, as to the rest of the crew, they are only the legal evidence of the contract, and the crew cannot recover more than the wages stipulated
248 therein.[3] When no rate of wages is stated, parol evidence is admissible to show the rate agreed upon.[4] (a) The certificate of the master is the best evidence in favor of the libellants, for seamen's wages, no shipping articles being produced.[5] A letter from the master, charging a seaman with desertion, is not evidence, nor is an extract from a police record in proof of a mariner's misconduct admissible.[6] Shipping articles are sometimes executed by the seamen with a blank for the name of the master; in which case they become bound to go with any master the owner may appoint, and he becomes liable to them for their wages.[7]

[1] The Prince Frederic, 2 Hagg. R. 396; Thompson *v.* Collins, 4 Bos. & Pull. R. 347.

[2] The Minerva, 1 Hagg. R. 353.

[3] Abbott on Ship. 434, *note* (4th Am. Ed.)

[4] The Harvey, 2 Hagg. R. 79.

[5] The Mary, Bee. Ad. R. 119.

[6] The Vibilia, 2 Hagg. R. 228.

[7] Abbott on Ship. 434, *note* (4th Am. Ed.)

(a) Wickham *v.* Blight, Gilpin R. 452; Contra, The Crusader, Ware R. 437.

The Act of Congress, for the government of seamen in the merchants' service, provides, in suits for seamen's wages, that it shall be incumbent on the master to produce, when required, the shipping articles, and log-book, to "ascertain any matter in dispute"; otherwise the libellants may state the contents, and the burden of proving the contrary shall be upon the master.[1] In the Courts of Common Law in England, the defendant, in such a case, will be 249 required to produce the shipping articles, and to furnish the plaintiff with a copy when necessary, in order to frame the declaration correctly.[2] The log-book is indispensable evidence to enforce the special statute forfeitures, mentioned in the Act of Congress for the government of seamen in the merchants' service. An omission of a seaman to render himself on board, at the time stipulated in the shipping articles before the commencement of the voyage, subjects him to a forfeiture of one day's pay for each hour's absence; and absence without leave, in the course of the voyage, subjects the seaman, if a proper entry be made in the log-book on the same day, to a forfeiture of three days' pay for every day's absence, if he returns within forty-eight hours; and, if he does not return within forty-eight hours, he incurs a forfeiture of all the wages then due him, and all his goods and chattels on board the ship, or in any store, where they may have been lodged at the time of the desertion; and he is further liable to pay all damages, which may be sustained in consequence of 250 being obliged to get another seaman in his room. If the party, before the commencement of the voyage, omits to

[1] Act of Cong. 1790, c. 56, § 6. [2] Abbott on Ship. 485, *note* (4th Am. Ed.)

render himself on board, or, after rendering himself on board, deserts, so that the ship proceeds to sea without him, he and his surety forfeit a sum equal to the advance wages, besides the sum advanced. The entries in the log-book must correspond with the description of the offences in the Act of Congress. Thus it is not sufficient to state, that the seaman was absent, or that he left the ship; the absence must be entered in the log-book, as without leave.[1] This entry is evidence; and supplementary proof is not required, although the entry is not conclusive, and this *primâ facie* proof may be controlled by other opposing testimony.[2] The log-book is not admitted as evidence to any fact, but that in which the Act of Congress renders it evidence; for attempts are often made to deceive by false entries.[3] It

251 was observed, by the Judge of the District Court of the United States for the Eastern District of Pennsylvania, that, in one case before him, a captain appeared to have made an entry of an offence by a seaman in a blank, in the log-book, accidentally left by the mate, the officer whose duty it is to keep the same.[4] In a case, lately tried in the District Court of the United States for the District of Massachusetts, a log-book was produced in evidence, containing numerous palpably false entries, made in similar accidental blanks, of alleged offences of the seamen, which was rejected, and a decree made immediately for the libellants.[5]

[1] Abbott on Ship. 468, *note* (4th Am. Ed.).

[2] Malone *v.* Bell et al., 1 Pet. Ad. R. 139; The Phœnix, ibid, 201; The Philadelphia, ibid, 211; Townsend *v.* Orne, 4 Mason R. 541.

[3] Ibid. [4] The Phœnix, 1 Pet. Ad. R. 201.

[5] Madder et al. *v.* Reed, U. S. Dist. Ct., Mass. Dist., Sept. Term, 1833.

The testimony of witnesses in the District and Circuit Courts of the United States, in civil causes of Admiralty jurisdiction, is frequently given *vivâ voce*, as it is in the British Courts of Admiralty, in causes heard *summarissime*, such as cases of seamen's wages.[1] But, in important causes, particularly those which will probably be carried to the Supreme Court of the United States, the testimony is taken by a commission. When depositions are given abroad, or when the parties, or their proctors, cannot conveniently attend, they are taken by such examiners as the 252 Court shall appoint, or by the aid of Letters Rogatory, upon interrogatories, filed by the parties and annexed to the commission; and the commissioners are authorized to administer the oaths to the witnesses. A commission will not, however, issue in a prize cause, to take testimony in the country of an enemy.[2] When the parties or their proctors can attend, a common commission issues to such persons as the Court may appoint,—generally to one or more of the commissioners appointed by the Court, by virtue of the laws of the United States,—authorizing them to administer the oaths and take the testimony for either party or both parties. Due notice of the time and place of taking the depositions is given by the commissioners to the parties, when the parties and their proctors are permitted to be present, and to propose their questions. The commissioners record all the questions and answers, noticing every objection made by the respective parties, and when the commission is executed, return their doings to the Court, under their certificate, with

[1] 2 Bro. Civ. and Ad. Law, 428.
[2] The Diana, 2 Gall. R. 93; The Magnus, 1 Rob. R. 31.

the deposition. When commissioners, acting by virtue
253 of a *dedimus potestatem*, commence the taking of a deposition on the day of which notice is given, they should adjourn from day to day, till the deposition be completed.[1] This is the general course of proceeding in the taking of depositions in the Admiralty practice in civil causes in the District and Circuit Courts of the United States for the District of Massachusetts. In most of the civil causes of Admiralty jurisdiction in this District Court, the testimony is given *vivâ voce;* but, whenever convenience or justice requires that it should be by deposition, a commission on motion is issued for this purpose.

In the Supreme Court of the United States, in an instance or revenue cause, the *vivâ voce* testimony of a witness will not be received, but his deposition will be required to be taken out of Court.[2] New evidence is admissible in that Court, in civil causes of Admiralty jurisdiction, on appeal, as in prize causes, and the testimony is taken by a commission. An instance cause is not tried like a prize cause
254 upon the original evidence, and further proof when required, ordered; in the former, further proof may be exhibited in the first instance, and, if the Court have doubts on the hearing, still further proof may be ordered.[3] Depositions *de bene esse*, according to the thirtieth section of the Judiciary Act of 1799, are not admissible in the Supreme Court; for the terms of the Act apply to the District and

[1] Buddicum *v.* Kirk, 3 Cranch R. 293.

[2] The Samuel, 3 Wheat. R. 77.

[3] The James Wells, 7 Cranch R. 22; The Clarissa Claiborne, ibid, 107; The Argo, 2 Wheat. R. 289, *note*.

Circuit Courts, and testimony to be used in the Supreme Court can be taken only according to its rules.[1] The depositions, taken by commission from the Courts of the United States, are not considered as taken *de bene esse;* but are evidence in chief, and absolute, whether the witness be within or beyond the process of the Court.[2] The act of Congress, respecting the taking of depositions, reserves a power to the Courts of the United States, to grant a *dedimus potestatem*, to take them according to the common usage, when it may be necessary to prevent a failure or delay of justice; and depositions thus taken are not considered as *de bene esse.*[3]

Affidavits to be used as further proof in the Supreme 255
Court of the United States, must be taken by a commissioner; the Court in which this was ruled, was one of prize jurisdiction.[4] In the Supreme Court of the United States, a commission to examine witnesses in a foreign country was refused, until the commissioners should be named.[5] If the return of the commissioners be enclosed in an envelope sealed, no other sealing is considered requisite.[6]

In the Circuit Court of the United States, it has been held, that commissioners act under a special authority of the Court, and must strictly confine themselves to the limits of the authority vested in them. Where a commission was directed to four persons jointly, and was executed by three of them, an objection to the admissibility of the testimony

[1] The Argo, 2 Wheat. R. 287.
[2] Sergeant *v.* Biddle, 4 Wheat. R. 508. [3] Ibid, 511.
[4] The London Packet, 2 Wheat. R. 371.
[5] Vanstophorst *v.* The State of Maryland, 2 Dall. R. 401.
[6] Grant *v.* Naylor, 4 Cranch R. 224–228.

was sustained, although two of the three commissioners were nominated by the party making the exception.[1] The same rule was adhered to, although the commissioners,
256 named by the party objecting, after attending, and partly executing the commission, withdrew and refused to proceed further.[2] Each interrogatory annexed to the commission should be fully answered; and the omission is fatal to the whole testimony of a witness, although, in answer to the general interrogatory, he may answer, that he knows nothing further material to either party.[3] A commission to take testimony in an Admiralty cause has been enlarged, upon proof of newly discovered evidence, not in the contemplation of the parties, when a former order had been made limiting the time of taking out the commission, which time had expired.[4]

In the Circuit Court of the United States for the First Circuit, it was held, that the Court might allow the interrogatories on commissions to be filed at any time, upon a proper case shown; and a special commission was granted to take the deposition of a witness in a foreign country, with instructions, that the interrogatories should be filed here by both parties, that no additional interrogatories should be admitted by the commissioners, and that
257 neither the parties nor the counsel should appear before them; a permission requested, that the witness, on account of his great age, might be attended by a friend to assist him before the commissioners, being refused by the

[1] Guppy et al. *v.* Brown, 4 Dall. R. 410; Armstrong *v.* Brown, 1 Wash. C. C. R. 43.

[2] Coxe's Dig. 159. [3] Ketland *v.* Bissett, 1 Wash. C. C. R. 144.

[4] The Ruby, 5 Mason R. 451.

Court.[1] Depositions fairly taken in a foreign country, by a Judge of that country, in the presence of the commissioners, were allowed to be used,—all the interrogatories having been put and answered, and the Government of the country having refused to allow the commissioners to act; as otherwise there would be a failure of justice.[2] When interrogatories are substantially, although not formally answered, as well where the depositions are taken by virtue of Letters Rogatory, as under a commission, the testimony will be received. Especially in the former case, the ends of justice seem to require a departure from the ordinary rules; but the extent to which this may go, is not settled.[3] It is a valid objection to a deposition, that the cross-interrogatories, annexed to the commission, were not propounded to the witness.[4] All proper interrogatories on each side 258 must be answered, or the deposition cannot be admitted to be read. If they are hypothetical and to be answered only in a certain event, which has not happened, or refer to records, which speak for themselves, they need not be answered.[5]

Testimony taken under a commission, in a case in which the United States was a party, was rejected because it had been opened by an officer of the Government before it came to the hands of the Clerk of the Court, and a new commission, with the original papers annexed, issued.[6] In the Supreme Court of Massachusetts, a deposition, in a libel for

[1] Cunningham *v.* Otis, 1 Gall. R. 166.
[2] Winthrop *v.* Union Ins. Co., 2 Wash. C. C. R. 7.
[3] Nelson et al. *v.* U. States, 1 Pet. C. C. R. 235.
[4] Gilpin *v.* Consequa, 1 Pet. C. C. R. 85.
[5] Bell *v.* Davidson, 3 Wash. C. C. R. 328.
[6] U. States *v.* Price's Adm'r., 2 Wash. C. C. R. 356.

a divorce, opened by mistake, by an agent of a party, was permitted to be used, on satisfactory proof of the mistake.[1] But, in the Supreme Court of the United States, it is held to be a fatal objection to the use of a deposition taken under the Act of Congress *de bene esse*, that it was not opened in Court; as where it was opened by the Clerk out of Court, upon the supposition that it was a letter to him.[2]

259 A deposition under a commission cannot be used, if the general interrogatory be not answered; nor can a deposition be admitted, in which a witness is merely asked, if a previous *ex parte* affidavit given by him contains the truth.[3] But it is not a fatal objection, that the deposition is not signed by the witness.[4] A deposition taken *de bene esse* cannot be admitted, unless the Judge, or commissioner, before whom it is taken, shall certify, that it was written by him, or by the witness in his presence.[5] Where a certificate of the magistrate, taking a deposition, stated that it was reduced to writing in his presence, but did not state by whom it was done, and it appeared that it had been written by the witness ten days before at a different place, when the magistrate was not present, the deposition was rejected.[6]

If a commission issue to two persons, jointly and severally, the deposition of one of them may be taken before the other.[7] The testimony of a person, taken under a joint and sev-

[1] Goff *v.* Goff, 1 Pick. R. 475.
[2] Beale *v.* Thompson et al., 8 Cranch R. 70.
[3] Richardson *v.* Golden, 3 Wash. C. C. R. 109.
[4] Ketland *v.* Bisset, 1 Wash. C. C. R. 144.
[5] Pettibone *v.* Derringer, Coxe's Dig. 243.
[6] U. States *v.* Smith, 4 Day R. 121.
[7] Lonsdale *v.* Brown, 3 Wash. C. C. R. 404.

eral commission to a number of persons, cannot be 260
read, if a person not named in the commission assisted
in the examination.[1] A commission, directed to be executed in a particular place, cannot be executed elsewhere.[2] If the circumstances which authorize the taking of the deposition of a witness *de bene esse* exist at the time of the trial, it may be read.[3] The magistrate should deliver the deposition, taken by him *de bene esse*, into Court personally, or it should be by him sealed up and directed to the Court.[4]

It is not a valid objection to a deposition, that it is in the English language, and that the commissioners are Dutchmen, who do not state, that they had the assistance of a sworn interpreter; neither is it a sound objection that the cross-interrogatories were not put to the respective witnesses, till they had all answered in chief.[5] The commissioners are the agents, not of the parties, but of the Court.[6] If it appear on the face of the proceedings, in taking a deposition under the Act of Congress, that the person taking 261
it was authorized by the Act of Congress, it will, in the
first instance, be considered, that he was authorized, for it is to be presumed, that it was taken pusuant to the Act; *primâ facie*, the officer is presumed to be *de facto* and *de jure* what he is described to be.[7]

The certificate of the magistrate, who takes a deposition, is good evidence to entitle it to be read, if all the necessary facts be stated; but it should distinctly appear, that the

[1] Willings *v.* Consequa, 1 Pet. C. C. R. 301.
[2] Bondereau et al. *v.* Montgomery, Coxe's Dig. 244.
[3] Jones *v.* Neal et al., Coxe's Dig. 215. [4] Ibid.
[5] Gilpins *v.* Consequa, Pet. C. C. R. 85. [6] Ibid.
[7] Ruggles *v.* Bucknor, 1 Paine R. 358.

requisitions of the law have been fully complied with.[1] A deposition *de bene esse* may be taken and used in a civil cause, when the witness lives at a greater distance than one hundred miles from the place of trial, although his residence be out of the District in which is the place of trial; and a decision of the Circuit Court of the United States for the Third Circuit, confining the operation of the Act of Congress respecting depositions *de bene esse* to depositions taken within the District in which the trial is to take place, is over-
262 ruled.[2] It is a useless act to issue a subpœna to a wit-ness who lives at a greater distance than one hundred miles from the place of holding the Court, in order to lay a foundation for using his deposition.[3] In the other cases, however, provided for by the Act of Congress, the witness must be subpœnaed and unable to attend at the trial.[4]

The circumstance, that the deponent was a seaman in the naval service of the United States, and liable to be ordered on distant service, is not a sufficient reason for the taking of his deposition *de bene esse*. The liability of a witness to be ordered beyond the reach of the process of the Court, is not one of the causes for taking depositions mentioned in the Act. In such a case, however, there would seem to be a propriety in applying to the Court for its aid.[5]

It may be questionable, whether the strict rules laid down

[1] Bell *v.* Morrison et al., 1 Pet. Sup. Ct. R. 351.

[2] Petap. Ins. Co. *v.* Southgate et al., 5 Pet. Sup. Ct. R. 604; Evans *v.* Hettick, 3 Wash. C. C. R. 417.

[3] Petap. Ins. Co. *v.* Southgate et al., 5 Pet. Sup. Ct. R. 604.

[4] Brown's Lessee *v.* Galloway, 1 Pet. C. C. R. 291; Penns' Lessee *v.* Ingraham, 2 Wash. C. C. R. 487.

[5] The Samuel. 1 Wheat. R. 9.

in the decisions which have been cited of the Courts of the United States, relative to the taking of depositions under the Act of Congress, would be enforced in Admiralty causes. Most of those decisions were made in Common 263
Law causes, and one of the reasons, assigned by the Courts, for this strictness, is, that the use of depositions is in derogation of the Common Law rule, which requires the *vivâ voce* testimony of the witnesses; so that all the requisites of the law must be complied with before such testimony is admissible.[1] But the general practice of the Courts of Admiralty, being according to the course of the Civil Law, requires that testimony should be given by deposition; the reason, therefore, for the strictness of the Courts of the United States, in Common Law causes, does not apply to Admiralty suits. But it should be recollected, that the Act of Congress, authorizing the use of depositions, and prescribing the mode of taking them, expressly embraces causes of Admiralty jurisdiction. The only safe course, therefore, in practice, is to conform to the rules laid down in these decisions of the Courts of the United States, which have been referred to.

It is advisable, when depositions are to be taken in an Admiralty suit, that they should be taken under a commission, rather than *de bene esse*, for then the tes- 264
timony becomes absolute. In all cases, where justice requires, commissions in Admiralty suits are obtained on motion in Court, or by an order of the Judge at chambers.

[1] Bell *v.* Morrison, 1 Pet. Sup. Ct. R. 355; U. States *v.* Smith, 4 Day R. 121.

It has been held, in the Circuit Court of the United States for the Second Circuit, that an objection to the competency of a witness should be made at the time of taking his deposition, and that, when a party, with a knowledge of the objection, attends the taking of the deposition, and cross-examines the deponent, the objection may reasonably be presumed to be waived, good faith requiring that the objection should be made at that time, in order to give the adverse party an opportunity to remove it; but, when there is neither actual nor constructive notice of the interest of the witness, the objection may be made at the trial.[1]

In causes of maritime salvage, the testimony of the persons on board the respective vessels is, from the necessity of the case, admitted; but this is confined to the facts occurring at the time of salvage.[2] In collision causes,
265 the same rule prevails, from the same necessity.[3]

This rule is considered an exception to the general rules of evidence adopted in Courts of Admiralty, excluding the testimony of a witness directly interested in the event of the suit.[4]

In the practice of the High Court of Admiralty in England, cases of salvage are brought upon affidavits, without any cross-examination of the deponents; and the practice seems to be for the salvors examined first to release their

[1] U. States *v.* One Case of Hair Pencils, 1 Paine R. 400.

[2] The Magnolia, 1 Sumner's R.; The Henry Ewbank, ibid; S. C. American Jurist, XII. 67; The Charlotte Caroline, 1 Dod. R. 192.

[3] The Woodrop Sims, 2 Dod. R. 83; The Thames, 5 Rob. R. 345; The Countess of Dover, 2 Hagg. R. 154; The Weskett, 486.

[4] The Boston, 1 Sumner's R.

interest.[1] But voluntary affidavits of witnesses, not subjected to the test of cross-examination, are heard with caution in that Court.[2] In a collision case in that Court, a protest of the master and crew of a foreign vessel was not admitted in evidence, although they could not remain in the country to be examined, the persons on board the other vessel remaining, who might all be witnesses.[3]

The lawfulness, or unlawfulness, of the mode of obtaining testimony, does not affect its admissibility; 266
the right of using it does not depend on the mode in which it is obtained, when it is competent and pertinent, and not in its own nature objectionable, as confessions obtained by threats or from inducements. The manner of obtaining the evidence is not considered in its estimation, but its value as proof; and, when the party comes to the possession of the testimony even by stratagem or direct force, it is competent.[4]

The proceedings of a foreign Court of Vice-Admiralty do not carry with them verity, so as to make them evidence *per se.* Proof *aliunde* is required, by a witness, who is acquainted with the seal of the Court, or the handwriting of the Judge or Clerk, or who has examined and compared the copy with the original, in the proper offices, or some other evidence of a similar character.[5] The certificate of the American Consul to the authenticity of the proceedings is not sufficient, for he is recognised, in the Law of Nations,

1 The Countess of Dover, 2 Hagg. R. 149, 152, *note.*
2 The Apollo, 1 Hagg. R. 315.
3 The Betsey Caines, 2 Hagg. R. 28.
4 The Jeune Eugénie, 2 Mason R. 441.
5 Catlett et al. *v.* Pac. Ins. Co., 1 Paine, 594.

only in commercial transactions, and is not invested with authority to authenticate judicial proceedings.[1]

267 A survey, ordered by an American Consul in a foreign port, and the report of the surveyors, are not evidence, because the proceeding is not judicial, and the facts must be proved as in other cases; but they might possibly have been allowed, had there been no tribunals at the place from which a regular order of survey and condemnation might have been obtained.[2] A paper, certified as a true copy by a Notary, is not evidence, unless he has the original in his custody, and is authorized to authenticate copies.[3]

Papers translated from a foreign language respecting the transactions of foreign officers, with whose powers and authorities the Court are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the Court, should be carefully examined before it is presumed that an officer holding a high place of trust has exceeded his authority.[4] On general principles of law, a copy of a paper given by a public officer, whose duty it is to keep the original,

268 should be received in evidence.[5] A copy of the record of the proceedings of a foreign Court, without a seal, and without proof that the Court has no seal, cannot be read, unless shown by proof to be a true copy.[6]

If a log-book be offered in evidence, it should be proved

[1] Catlett et al. *v.* Pac. Ins. Co., 1 Paine, 594.
[2] Cort et al. *v.* Del. Ins. Co., 2 Wash. C. C. R. 375.
[3] Talcott *v.* Del. Ins. Co., 2 Wash. C. C. R. 449.
[4] U. States *v.* Percheman, 7 Pet. Sup. Ct. R. 51. [5] Ibid.
[6] Talcott *v.* Del. Ins. Co., 2 Wash. C. C. R. 478.

to be the book kept on the voyage. The title written on the cover does not identify it; nor is it sufficient to show that it contains in many parts the handwriting of the mate.[1] But, in a subsequent trial of the cause in which this point was decided, the log-book was admitted in evidence, upon proof that it was the book kept on the voyage, and upon further proof, that reasonable diligence had been used by resorting to newspaper advertisements to find the mate.[2]

The *roll d'equipage* is evidence to prove an individual to have been a seaman of a ship, the shipping articles having been lost.[3] A letter of administration on a seaman's estate is presumptive proof of his death.[4]

A protest is admissible to contradict the evidence 269
given by a party to it.[5] But, generally, it is not evidence for either party.[6] Nothing said by a master of a ship can countervail his protest.[7]

Shipping articles are evidence in a controversy between the master and owner, as well as between the seamen and the master and owners; they constitute a part of the documents of the ship, and the owner is presumed to have access to them, and to be acquainted with their contents; they are not conclusive, but *primâ facie* evidence, and the burthen of proof is on the owner to show mistake or interpolation.[8]

[1] U. States *v.* Mitchell, 3 Wash. C. C. R. 95.
[2] U. States *v.* Mitchell, 3 Wash. C. C. R. 95.
[3] Ketland *v.* Lebering's Adm'r., 2 Wash. C. C. R. 201. [4] Ibid.
[5] Winthrop *v.* Union Ins. Co., 2 Wash. C. C. R. 7.
[6] Scriba *v.* Ins. Co. of N. America, 1 Wash. C. C. R. 408, *note.*
[7] The Alknomac, Bee. Ad. R. 127.
[8] Willard *v.* Dorr, 3 Mason R. 169.

The certificate of a Governor of a West India Island, without a seal, but whose signature was proved, has been admitted to show that a master of a vessel had petitioned for liberty to take away a cargo, and had been refused, it being an official act, and the certificate given at the time.[1]

An official letter of a British Admiral, that a particular
270 vessel sailed from his squadron, and carried a flag of truce, is evidence; it is not to be discredited because from an enemy, for civilized nations are bound to give credit to the official declarations of the commander of the enemy's forces.[2] The certificate of the Secretary of State of the United States is the best evidence to prove that a person has been received and accredited as the Minister of a foreign nation, and also that an individual was presented and received as the Secretary of Legation.[3] The certificate of a Consul or Commercial Agent of the United States, under his hand, and official seal, is *primâ facie* evidence of the refusal of a master of a ship in a foreign country, to receive on board his ship destitute American seamen, as passengers, according to the requisition of the laws of the United States.[4] (*a*) The certificate of respectable persons to the amount of damages to the party in an Admiralty suit is not competent evidence.[5] A certificate, authenticating a copy

[1] U. States *v.* Mitchell et al., 3 Wash. C. C. R. 95.
[2] U. States *v.* Pryor, ibid, 234.
[3] U. States v. Liddle, 2 Wash. C. C. R. 205.
[4] Act of Cong. 1803, ch. 62, § 4. [5] Cotton *v.* Wallace, 3 Dall. R. 302.

(*a*) A Consul's certificate is not evidence of any fact between third parties, unless made so by statute.—Levy *v.* Burley, 2 Sumner R. 355.

of a paper by an officer, who has the possession of the original, cannot be given in evidence, unless he be 271 authorized by law, to certify such copies.[1]

The certificate of a Register of a Vice-Admiralty Court is not evidence of the loss of a warrant of survey of a wrecked vessel; this fact should be established by a deposition taken under a commission.[2] Neither is parol evidence admissible of the contents of a warrant and survey of a wrecked vessel, under the authority of an Admiralty Court, for the proceedings are judicial; but the facts may be proved by other testimony.[3]

A certificate of surveyors of a wrecked vessel, under the authority of an Admiralty Court, is not evidence of the facts contained in it, but only that a survey took place; but if the surveyors, in their deposition, refer to the report as containing all they know on the subject, it is evidence, because it becomes incorporated in the depositions which attest to its verity.[4] The certificate of the American Consul, that a ship's papers were lodged with him, agreeably to the Act of Congress, is evidence, but not to other facts.[5] In a libel of information against a ship, 272 for having been entered as an American ship, when she had been transferred to a foreigner, certificates under notarial seals of instruments of transfer were allowed to be disproved by parol evidence, the Court giving no opinion as to the admissibility of such evidence, but deciding that it

1 Bleeker *v.* Bond, 3 Wash. C. C. R. 529.
2 Robinson *v.* Clifford, 2 Wash. C. C. R. 1. 3 Ibid.
4 Watson et al. *v.* The Ins. Co. of N. America, 2 Wash. C. C. R. 152, 478.
5 U. States *v.* Mitchell, 3 Wash. C. C. R. 95.

was open to contradiction.[1] The certificate of a Collector to a copy of a ship's register was refused, in a Court of Common Law, in the State of New York, because he was not considered as authorized to grant and certify copies generally; but in the Courts of the United States, a certified copy by him of documents which he is required to record, is admissible.[2]

A notice given to produce papers does not make them evidence when produced; if the party giving the notice wishes to waive the reading them in evidence, he will be permitted so to do.[3] But the party who has given
273 notice, has no right to inspect the papers, but upon the condition of reading them in evidence.[4] The party calling for papers may suggest, that they are in the possession of the other party, without proof of the fact; and the party, called upon to exonerate himself from the obligation to produce them, must establish his evidence on his own affidavit, that it is out of his power to produce them. The party calling may, upon the non-production, offer inferior evidence of their contents, and press the unfavourable presumptions which arise; or may, under the Act of Congress on this subject, move for a nonsuit or default of his adversary, which will, upon a proper notice to the other side, be awarded, if the papers, being pertinent to the issue, and in the power or possession of the party, are not produced.[5] In order to enable a party to nonsuit or default the other party,

[1] The Jason, Pet. C. C. R. 450.
[2] Abbott on Ship. (4th Am. Ed.) 63, *note;* U. States *v.* Johnson, 4 Dall. R. 415
[3] Blight *v.* Ashley et al., Pet. C. C. R. 15.
[4] Jordan *v.* Wilkins, 2 Wash. C. C. R. 483.
[5] Bas et al. *v.* Steele, 3 Wash. C. C. R. 381.

for the non-production of papers, under the Act of Congress, an order of Court must be first obtained, under a regular notice; the order may not be absolute, but conditional, by which the Court will be at liberty to enforce the rule, unless good cause be shown for the non-production of 274 the papers called for.[1] The Act of Congress was intended to prevent the necessity of invoking the aid of a Court of Equity, to obtain from an adverse party the production of deeds, papers, and books, and the Court will see that the purposes of substantial justice are effected, and that advantage is not taken of either party. Notice served upon an attorney, whose client lives at a distance, is a cause for a reasonable postponement; and original deeds which are recorded, will not, unless it be essential, be required to be produced.[2] A notice to produce papers is sufficiently specific, when they are described by their subject matter.[3] But if the defendant on oath answers, that he has not a letter which he has been notified to produce, and after diligent search could find none such, secondary proof cannot be offered of its contents, and the party cannot be compelled to answer, whether he ever had such a letter in his possession.[4] When a paper called for is produced, and the acknowledgment of the party producing it will make 275 it evidence, as in the case of a letter or the like, it may be read; but where the instrument produced is one which is inoperative, unless certain forms are pursued or proofs

[1] Bas et al. *v.* Steele, 3 Wash. C. C. R. 381; Dunham *v.* Riley, 4 Wash. C. C. R. 126.

[2] Geyger *v.* Geyger, 2 Dall. R. 332.

[3] Vasse *v.* Mifflin, 4 Wash. C. C. R. 519. [4] Ibid.

given to make it effectual, as a will, it must be strictly proved before it can be given in evidence.[1] It is premature for either party to call upon the other to produce papers, which he has been notified to produce, until the trial has commenced, and the Court have had an opportunity of ascertaining whether they are pertinent to the issue.[2]

A receipt by a seaman is only *primâ facie* evidence, and the circumstances under which it is given may be examined. (*a*) Fraud, or improper practices, or mistake, will invalidate the receipt; but settlements with deliberation and full explanation of all the circumstances, will not be lightly set aside.[3] Receipts, generally, are open to explanation.[4]

Seamen, in particular, are a class of men under the
276 protection of Courts of Admiralty; and, when receipts have been given by them through mistake, or when deception or intimidation has been practised upon them, or there has been an unobserved comprehensiveness in the language, the circumstances will be open to inquiry, and the receipts will not be sustained.[5] If a party act under ignorance of his rights, either in point of law or fact, the re-

[1] Hylton's Lessee *v.* Brown, Coxe's Dig. 506.

[2] Ibid, 1 Wash. C. C. R. 298.

[3] Thorne *v.* White, 1 Pet. Ad. R. 168; Jackson *v.* White, ibid, 179.

[4] Stackpole *v.* Arnold, 11 Mass. R. 32; Laurence *v.* Schuylkill Nav. Co., 4 Wash. C. C. R. 562.

[5] Harden *v.* Gordon, 2 Mason R. 541; The Enchantress, 1 Hagg. R. 395.

(*a*) A release under seal by a seaman is not an estoppel; it is only *primâ facie* evidence.—The Nimrod, Ware R. 2; The David Pratt, Ware R. 495.

ceipt is not binding; but this is when the idea of a compromise is excluded.[1] (*a*)

Ancient historical facts of general notoriety may be proved by reputation, and they may be established by historical works of known character and accuracy.[2] Foreign laws should be proved as facts, for with them the Court cannot be bound to be acquainted.[3] Comparison of hands is not considered admissible evidence in the Supreme Court of the United States, where the witness has no precise knowledge of the handwriting, unless, from the antiquity of the writing, no witness can be produced, who has seen the party write; and then comparison of hands 277 with documents known to be genuine is admissible.[4] But comparison of hands, by the juxtaposition of two writings, in order to decide whether both were written by the same person, has been admitted in many civil cases in the Courts of Common Law in England, and in several States of the Union.[5]

Whenever it may be necessary that original papers should be inspected by the Supreme Court of the United States, on the appeal of a cause, the Judge of the Court

[1] Laurence *v.* Schuylkill Nav. Co., 4 Wash. C. C. R. 562.

[2] Morris *v.* Harmer's Lessee, 7 Pet. Sup. C. R. 554.

[3] Strother *v.* Lewis, 6 Pet. Sup. C. R. 763. [4] Ibid.

[5] 2 Starkie on Evid. 374, (5th Amer. from 2d Lond. Ed.); U. States *v.* Craig, 4 Wash. C. C. R. 731.

(*a*) A receipt given by a seaman on receiving the sum due to him for wages, stating that it was in full for all services and demands for assault, battery and imprisonment against the owner and officers, is no bar to a suit in Admiralty for assault, battery and imprisonment.—Thomas *v.* Lane, 2 Sumner R. 1.

from which the appeal is made, is authorized, by a rule[1] of the Supreme Court, to make such rule or order, for the safe keeping, transporting, and returning such original papers, as may be required.

In a libel of information for a forfeiture, or a seizure, by virtue of the Collection Act of 1799, when probable cause is shown for the prosecution, to be judged of by the Court before whom the prosecution is had, the *onus probandi* is upon the claimant.[2] When the *onus probandi*, in an instance or revenue cause of libel or information, 278 is thrown upon the claimant by a *primâ facie* case made in support of the prosecution, if the claimant fails to explain away the difficulties of the case, condemnation will follow from the defects of testimony on his part.[3] When the claimant relies upon a special defence, against a forfeiture, the *onus probandi* rests upon him, and he must make out, beyond any reasonable doubt, a justification in point of fact and law.[4] The *onus probandi* in all matters of fact in revenue causes is considered, by the High Court of Admiralty in England, to be on the claimant; and where the fact is clear, and the explanation doubtful, the Court judges by the fact.[5]

It has been held in the Circuit Court of the United States for the First Circuit, that, when the case did not fall within the Collection Act of 1799, every fact alleged in the libel, and necessary to sustain the asserted forfeiture, must be

[1] Feb. Term, 1817, 2 Wheat. R. vii.
[2] Act of Cong. 1799, ch. 128, § 81. [3] The Luminary, 8 Wheat. R. 407.
[4] The Short Staple, 1 Gall. R. 104.
[5] The Matchless, 1 Hagg. R. 105; The Union, ibid, 36.

affirmatively established by the Government.[1] But it has been held in the Circuit Court of the United 279
States for the Third Circuit, that when property was seized *in delicto*, under the Act of Congress prohibiting intercourse with Great Britain, passed March 1st, 1809, the burden of proof was upon the claimant, to explain his conduct, and to show the transaction to be innocent; and that, if he failed so to do, the breach of the law would be considered to have been committed.[2]

Where a vessel, seized under the laws of the United States against the slave-trade, which has been lately American property, is prosecuted, something more than the mere changing of papers will be required to establish the fact of a *bonâ fide* transfer to the ostensible foreign owners. Affirmative evidence must be produced, to show that the case has no admixture of American interests, when a title is set up by the claimant derived from American owners.[3]

In a case where an American seaman has been discharged with his own consent in a foreign port, by the master, the *onus probandi* is upon the master to show the payment of the three months extra wages required by our laws to be paid, in such a case, to the Consul of the United 280
States.[4]

A tender in a case of seaman's wages is an admission of the service, and narrows the case to a question of *quantum*.[5]

[1] U. States *v.* An Open Boat, 5 Mason R. 232.
[2] The Paul Sherman, Pet. C. C. R. 98.
[3] La Jeune Eugénie, 2 Mason R. 434.
[4] Orne *v.* Townsend, 4 Mason R. 541.
[5] The Porcupine, 1 Hagg. R. 378.

But an offer to pay a sum of money, as a compromise of the suit, is not an admission of the justice of the claim.[1]

In an action for a tort to a ship, possession and asserted ownership are sufficient evidence, without documentray proof; for this is not required, unless the asserted ownership be denied, and the party has been notified to produce documentary evidence of title; and the register of the vessel *per se* would not be sufficient evidence, unless accompanied with possession.[2]

The general maritime law requires that the title to a ship in a foreign trade, should be evidenced by written documents; and a Court of Admiralty, in its ordinary practice, always requires it. A bill of sale is the commercial
281 instrument of the transfer of ships in the usage of all maritime countries.[3] And it is indispensable to a valid sale of a vessel in order to preserve the national character, under the Registry Act of the United States.[4]

A party, who claims property in a ship derived from the sentence of condemnation by a foreign tribunal, must prove that this tribunal was lawfully constituted. A foreign Court, of the origin of which the Courts of the United States are not informed, is to be presumed a legitimate tribunal; but when the source of its authority is stated, it should be examined, and the burden is shifted and thrown upon the party who seeks to support the condemnation; and when a Court is constituted by a different authority from what is

[1] The Vrouw Margaretha, 4 Rob. R. 104; The John and Thomas, 1 Hagg. R. 157.

[2] Bas et al. *v.* Steele, 3 Wash. C. C. R. 381.

[3] The Sisters, 5 Rob. R. 155; Orne *v.* The Eagle Ins. Co., 4 Mason R. 172.

[4] Orne *v.* The Eagle Ins. Co., 4 Mason R. 172; Act of Cong. 1792, ch. 1, § 14.

usual in civilized nations, as by a Military Commander, and particularly by one not a Commander-in-chief, it is a circumstance so unusual as to require the party supporting the condemnation to show that the Court was instituted by lawful authority.[1]

In the Courts of Common Law in England, it is 282
holden, that the registry of a vessel is not even *primâ facie* proof of ownership, without evidence of the privity of the person registered as owner, as the ship may have been registered fraudulently; but, for a considerable length of time in these Courts, the Custom House documents were considered *primâ facie*, but not conclusive, evidence of ownership.[2] It has been decided in many cases in England in the Common Law Courts, under the British Registry Acts, that the register is conclusive against the title of persons claiming the ship, and whose names were not in the certificate.[3]

In the United States, it has been decided, that the register is not, of itself, evidence of the ownership of a ship by a person, in a suit against him in order to establish his liability; nor is it evidence to disprove a title in a party, as a legal title may exist in a person, independent of the registry. But it is not directly settled, that it is evidence in favor of a party in whose name it stands, and it is considered doubtful whether the register is *primâ facie* evidence of citizenship, though it may be of property.[4] A person, in whose
name a ship was enrolled with his privity in the Cus- 283
tom House, but who in fact held her as a security for a debt, and who had not taken possession, was held liable

[1] Snell et al. *v.* Fausatt, 1 Wash. C. C. R. 271.
[2] Abbott on Ship. (4th Am. Ed.) 62. [3] Ibid.
[4] Ibid; Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. R. 61.

for repairs made by a tradesman, who charged the repairs to the vessel.[1] A registered owner was also held liable for supplies by material-men, upon evidence that the ship was registered in the name of the defendant, with his privity, and that the charges were made to the ship and owners.[2]

The strict doctrine of the Common Law respecting a variance of the evidence from the pleadings, is not adopted in the Admiralty. The variance between the allegations and the proofs must be material; and, if either party makes a mistake in setting out his case, which could not mislead the other party, a decree will be made notwithstanding the variance; and, in all cases where justice may require it, in order to remove the objection of variance, amendments will be permitted.[3]

284 The allegations in a libel are not to be taken as true, because the answer neither admits nor denies them; for there may be false allegations, which the respondent, from want of knowledge on the subject, may not be able to deny. If the answer do not admit the allegations, they must be proved, the maxims of the Civil Law, "*Ei incumbit probatio, qui dicit, non qui negat*," and "*Nullus idoneus testis in re suâ intelligitur*," being adopted in the Admiralty Courts of the United States.[4]

The mere claim in Admiralty, in a suit *in rem*, is not, like an answer in Chancery, evidence for the respondent, which

[1] Tucker *v.* Buffinton, 15 Mass. R. 477.

[2] Simpson *v.* Rivers, U. S. Dist. Ct., Mass. Dist., June Term, 1831; Henshaw *v.* Rivers, ibid.

[3] The Wm. Penn, 3 Wash. C. C. R. 484; Orne *v.* Townsend, 4 Mason R. 543.

[4] The Dodge Healy, 4 Wash. C. C. R. 651.

must be disproved by more than one witness.[1] But when the answer is required by the libellant to be upon oath, it becomes, when responsive to the libel or interrogatory, evidence for the respondent, which must be disproved by the evidence of more than one witness.[2] (a)

According to the practice of the Civil Law Courts, if the libellant has not fully made out his case, but has made half proof or more, his proctor may move to have the 285 suppletory oath administered to his client. This motion may be opposed by the proctor for the respondent, and when it is requisite a time is assigned for the hearing. If the Judge is satisfied that the libellant has made half proof, or more than half, but not whole proof, he is bound to ad-

[1] The Matilda. 4 Hall's Am. Law Journal, 478.

[2] Randal v. Phillips et al., 3 Mason R. 378; The Rambler, Bee. Ad. R. 9.

(a) The allegations of one of the parties in a libel are not evidence for him unless called for by the other side; and they are then to be weighed as they deserve, without requiring in all cases more than one witness to overcome them.—Jay v. Almy, 1 Woodbury & Minot R. 262.

Courts of Admiralty do not recognise the rule in equity requiring two witnesses, or one witness and strong corroborative circumstances, to overcome the denial in the answer.—Sherwood v. Hall, 3 Sumner R. 127.

An answer is not, strictly speaking, evidence; but credit may be given it according to the apparent good faith with which it is made.—The Crusader, Ware R. 443.

Where there is no other evidence than the answer, of its having been part of the original agreement, that a removal of one of the masters should dissolve the contract, the evidence is not sufficient.—Andrews v. Wall, 3 Howard R. 568.

The respondent's answer on oath in reply to interrogatories is not positive evidence in his own favor. Its true effect is either to furnish evidence for the other party, or, in case of doubt, to turn the scale in the respondent's favor.—Cushman v. Ryan, 1 Story R. 91.

minister the suppletory oath to him, in which the party makes oath "that of his own certain knowledge the facts stated in his allegations, respecting which he wishes to have the oath administered to him, are true." But this oath cannot be administered to a party who is shown to be of bad character.[1] The oath should be applied for before the conclusion of the cause, and, if not then administered, it should be again applied for after the conclusion; for in that case the Judge may administer the oath either before or after the conclusion; otherwise not.[2] This oath is sometimes called *juramentum necessarium;* and the Judge, when there is a want of full proof on either side, may administer it either to the plaintiff or defendant. This *juramentum necessarium* is sometimes subdivided into suppletory
286 and purgatory oaths, which latter the Judge may impose upon him on whom the presumption seems chiefly to press. When there is either nothing, or the whole matter proved, the oath to the party cannot be administered; but, when there is half proof only, it may be administered, at the discretion of the Court, to either party. When the defendant has one proof and the plaintiff another, then the oath ought to be administered to the former, as the Court should incline to mercy, rather than judgment.[3]

Full proof is said to consist in confessions, testimony of witnesses, public written instruments, and deeds, oaths, and presumptions *juris et de jure.*[4] Half proof is made by one witness, by private books of account, by common fame, and

[1] Hall's Adm. Prac. 93; Law's Eccl. Law, 285, 286.
[2] Law's Eccl. Law, 285. [3] Ibid, 284, *note* 2.
[4] 2 Bro. Civ. and Ad. Law, 370, 385.

and by comparison of hand-writing.[1] The conjunction of two half proofs produces a full proof.[2] Though a single witness generally makes but half a proof, yet there were exceptions to this general rule in the Civil Law, as in cases of great difficulty, where no other evidence could be had, or in unimportant causes, or where the witness was of very extraordinary rank or character.[3] In general, 287 where half proof has been made, a supplementary oath or oath of the party is to be superadded to make full proof.

No instance is known in which the suppletory oath has ever been administered to a plaintiff in the Admiralty Courts of the United States, in civil causes of Admiralty jurisdiction, except a party's oath in support of his book charges. (*a*) The purgatory oath to the adverse party is often compelled in these Courts by pointed interrogatories, justified by the general rules of practice. In the District Court of Massachusetts, it is the constant practice to receive the oath of a party in support of his book of charges, which is a species of suppletory oath, and so considered and classed by the writers of the Civil Law.[4] But this species of evidence is admissible in the Common Law Courts of New England, and many other States.[5] In the Supreme Court of

[1] 2 Bro. Civ. and Ad. Law, 370. [2] Ibid. [3] Ibid, 385.
[4] Hall's Adm. Prac. 95; Heinecc. in Pand., P. 4, § 134.
[5] Bigelow's Dig., Evidence, L; Prince, Adm'x, *v.* Smith, 4 Mass. R. 455.

(*a*) A charge by the master on his shipping paper, fortified by his suppletory oath, would be proof.—The David Pratt, Ware R. 505.

the State of Maine, the suppletory evidence of the plaintiff in a cause at Common Law was admitted, to prove the particular contents of a trunk of goods, which a
288 shipmaster received on board his vessel on freight, and which he broke open and rifled; there being no other evidence of the contents of the trunk to be obtained, and the plaintiff having sustained his action by other testimony on all points, but the extent of his damage.[1] It is not settled how far the Admiralty Courts of the United States have adopted, in civil cases, the principle of the Civil Law requiring two witnesses in cases, where, at Common Law, one would be sufficient. It was held by a learned Admiralty Judge in the Eastern District of Pennsylvania, that the practice of the Civil Law Courts was most congenial with Admiralty proceedings, and that he should consider himself justified in adopting the Civil Law rule on this subject, when the purposes of justice should render it necessary, although he had not generally attended to it, and did not know that the Admiralty law, in the principles of evidence, was different from the Common Law.[2] In a case where the Civil Law rule is adopted, the suppletory oath would seem admissible, when the party has made half proof by one witness.[3]

289 There is a security against false testimony and unfair representations in the Admiralty Courts in Europe, in the oaths of calumny and malice. The substance of the former oath is contained in the following Latin verses:

1 Herman v. Drinkwater, 1 Greenl. R. 27.
2 The Ship Betsey, 2 Bro. Penn. R. 349.
3 Hall's Adm. Prac. 94; 2 Bro. Civ. and Ad. Law, 386.

"Illud juretur, quod lis tibi justa videtur;
Et, si quæretur, verum non inficietur;
Nil promittetur; nec falsa probatio detur;
Ut lis tardetur, dilatio nulla petetur."

In this, the party swears to the justice of his cause, that he will not knowingly offer false proof, that he will not fraudulently delay his opponent, that he neither has bribed, nor will give any bribe, for the sake of gaining his cause, and that he has only paid the lawful fees, and to those authorized to receive them. This oath is taken only once in a cause, and usually immediately after contestation of suit; but, if omitted then, it may be required at any subsequent stage of the suit. There is also the special oath against calumny called the oath against malice, which the Judge may, at any stage of the cause, whether required by the parties or not, cause to be administered. These oaths may be administered to both parties; and it is said, that they were in use in the Roman Courts in the time of Cicero, and are alluded to by him in his oration in defence of Ros- 290
cius.[1] If the libellant refuses to take the oath of calumny, he is required to desist from the further prosecution of his suit. If the defendant refuses, he is condemned as confessing the charges against him.[2] No instance is known in which these oaths have been adopted in the practice of the Admiralty Courts of the United States.

There is also a mode of proof in the Civil Law Courts, called the oath decisory, which one of the litigant parties tenders to the other; offering to have the cause decided by the oath of his adversary, which he either must accept or

[1] Law's Eccl. Law, 282–284, and *notes*. [2] Ibid, 283, *note*.

render back a similar proposal; otherwise he will be condemned as confessing the allegations against him.[1] This has been practically adopted in the District Court of the United States for the District of Massachusetts, and Admiralty causes have been determined in that Court, by the oath decisory; but the cases in which this oath has been adopted have been where the tender has been accepted, and no case is known to have occurred there in which the oath has
291 been refused and tendered back to the adversary. It remains to be decided, whether that would be permitted, or whether the party's refusal of such an offer would raise so strong a presumption against the justice of his case, as to induce the Judge to decide the cause against him.

[1] Law's Eccl. Law, 282, *note*; Wood's Civ. Law, 314.

CHAPTER XI. 292

THE TRIAL AND DECREE.

THE cause being set down for trial, and the parties ready to proceed, the libel is read by the proctor for the libellant, and the answer by the proctor for the respondent. The proctor for the libellant then reads the written evidence, if there be any, in behalf of his client, and calls his witnesses, who are duly sworn, or affirmed. They are then examined by him, and cross-examined by the respondent, generally in the same manner as in a Court of Common Law. The case being thus opened, the proctor for the libellant then states briefly the points of law which he intends to make, and cites the authorities on which he relies.

The proctor for the respondent then reads the written evidence, if there be any in behalf of his client, and calls his witnesses, who, after being duly sworn, or affirmed, are examined by him, and cross-examined by the proctor for the libellant.

The closing argument in the defence is then made, in which the points of law, and authorities, relied on 293 in behalf of the respondent, are stated. This is followed by the closing argument in favor of the libellant.

The examination is conducted generally with more conciseness and delicacy towards the witnesses, than is observed in the Common Law practice; and many of the strict rules of the Common Law Courts respecting calling

witnesses a second time are not rigorously enforced; every indulgence and opportunity being afforded, both in behalf of the parties and the witnesses, for the correction of any mistakes which may have occurred in the giving of testimony.[1]

In the District of Massachusetts, the written testimony in civil causes of Admiralty jurisdiction is not kept close until the whole testimony be taken, as is the practice of the High Court of Admiralty in England. Commissions are opened, as they are returned executed into Court, without any general order for the publication of testimony; and it is a common practice among the gentlemen of the Bar, to loan each other the depositions taken in behalf of their respective
294 clients, in order that the counsel may prepare their causes, and come to the trial with a full knowledge of the evidence. It is believed that a similar practice exists in all the Admiralty Courts of the United States.

The Advocates are always fully heard in the Admiralty Courts of the United States; but, except in cases of great difficulty and importance, points of law are briefly stated, cases are cited without enlarged comments, prominent points of the evidence only are touched upon, and the arguments which are addressed to the Court are condensed and concise. More elaborate professional efforts are obviously unnecessary in common causes, tried by Judges of ability, learning, and experience, and perfectly conversant with the nature of the cases which are brought before them for their decision. There are, however, occasionally in these Courts causes in which the testimony is very voluminous, and

[1] 2 Bro. Civ. and Ad. Law, 421.

which require the most laborious efforts of counsel. Perhaps there are no Courts in which the younger members of the profession can better acquire a clear and concise style of forensic reasoning, than in the Courts of Admiralty, if they cautiously avoid falling into a conversational style of arguing, the too common error of practisers there. The Advocate should wait patiently until his time comes 295
to address the Court, and should then present distinctly and connectedly all his arguments.

In the trial of Admiralty causes, in the District Court of the United States for the District of Massachusetts, it has sometimes happened, even after a cause has been submitted for judgment, that the Judge has been satisfied that the libellant, or respondent, had a good case, or defence, but had not fully made it out by legal evidence. In such a case the Judge has not been accustomed to pronounce a decree against a party, if he has had good ground to believe that the deficiency might be supplied upon opportunity being given; and the cause has been postponed to enable him to supply such deficiency. In a Court of Common Law no such indulgence is extended; for the jury, being charged with a cause, must deliver themselves by a verdict, which must be conformable to the evidence before them. If a jury, in their deliberations, are perfectly satisfied that a party has made out his case, with the exception of but one necessary link in the chain of testimony, however well persuaded they may be, that if an opportunity were afforded, that link would be supplied, they must return a verdict against him; and in most cases the verdict will stand, a con- 296
clusive bar against a re-examination of the cause. If

this be suggested as a hardship, the answer of the Common Law Judge will be, that every man is presumed to know the law, and it was the folly of the party to go to trial without having his chain of evidence complete. Yet the most learned of those who so rigorously apply to parties the maxim, that every man is presumed to know the law, are living instances of its incorrectness; for they often make mistakes in law, and, at the Law Terms of the Common Law Courts, reverse their own *nisi prius* decisions.

The cause being heard, the Judge, if the case does not require delay for deliberation or the preparation of a written opinion, pronounces his judgment and makes his decree, which decree is recorded by the Clerk. In causes, in which the Judge considers it proper that an opinion should be given in writing, or where he wishes for time for deliberation, a day is appointed for judgment, and on the day fixed, which is generally the next Court day, the opinion is delivered and the decree made.

The decrees are conformable to the nature of the causes.

In petitory suits the decree declares in whom the pro-
297 perty in the ship is, and orders the possession to be delivered according to the adjudged title. In possessory causes, the possession of the ship is decreed to the libellant, upon such terms as may be required by the Judge, or restored to the respondent. In a possessory cause, in the District Court of the United States for the District of Massachusetts, where a dissentient part-owner of a ship had fraudulently and maliciously conveyed a part of his interest to an alien, in order to prevent the other part-owners, who held a majority of the interests, from obtaining the

documents of an American ship, and sending her to sea, the Judge decreed the bill of sale to the alien to be null and void, and that the other part-owners should have the possession of the ship for the voyage on which they wished to send her, on giving the usual bond for the return of the ship, or the payment of the value of the dissentient part-owner's share.[1] In cases of maritime contract, the decree is for a certain sum of money. In causes *in rem*, when the thing in controversy is in the custody of the Court, it acts upon it, and makes such a decree as justice may require, ordering the delivery of the thing to the party who has the right.[2] In revenue instance causes, cogniza- 298
ble in the Admiralty, when a condemnation takes place, and the goods condemned have not been given up upon bail, a decree is made for a sale by the Marshal, by public auction, at such place as the Court may appoint; giving at least fifteen days' notice, except in case of perishable goods, in one or more of the public newspapers of the place where such sale shall be; or, if no paper is published in such place, in one or more of the papers published in the nearest place thereto.[3] In cases of acquittal in revenue instance causes, the decree is for a restoration of the property in the custody of the Court, and a warrant of delivery is immediately issued; and where there was reasonable cause of seizure, the Judge certifies that fact, or causes an entry to be made thereof, which protects the seizing officer from

[1] The Forrester, U. S. Dist. Ct., Mass. Dist., Dec. Term, 1833.
[2] Jennings *v.* Carson, 4 Cranch R. 23.
[3] Act of Cong. 1799, ch. 128, § 90.

any prosecution therefor.[1] When a decree of condemnation is made, in revenue instance causes, of goods which have been delivered upon bond, if the claimant shall not, 299 within twenty days after the decree of condemnation, pay into Court, or to the proper officer thereof, the amount of the property condemned, with the costs, judgment is granted on the bond, on motion in open Court, without further delay.[2]

In a cause of seizure for a forfeiture under the laws of the United States, the right to decide upon the same exclusively belongs to the proper Court of the United States; if a sentence of condemnation be pronounced, it is conclusive, that a forfeiture is incurred; and if a sentence of acquittal, it is equally conclusive against the forfeiture.[3]

When a decree is made in the High Court of Admiralty in England, an edict is published requiring the principal to pay the sum decreed and the taxed costs; and, if the decree be not performed, the bail or sureties are admonished to perform the decree according to their stipulation.[4] A certain time of payment is fixed by the Judge, at his pleasure, which is usually twenty, thirty, or forty days, in the case of a decree against the principal party and the granting of a 300 motion for a monition against him.[5] If the mandate of monition, with a certificate that the person has fled, or concealed himself, so that it cannot be served, be brought into Court, a monition will issue upon motion requiring the

[1] Act of Cong. 1799, ch. 128, § 89; Act of Cong. 1807, ch. 74; Act of Cong. 1815, ch. 246, § 7. [2] Act of Cong. 1799, ch. 128, § 89.

[3] Slocum *v.* Mayberry, 2 Wheat. R. 1; Gelston *v.* Hoyt, 3 Wheat. R. 312.

[4] 2 Bro. Civ. and Ad. Law, 429, 356, 407. [5] Clerke's Prax. Tit. 63.

fidejussores to pay the principal sum and the costs within some certain day; otherwise, that they be taken into custody, until the same is paid.[1] But the Judge may, in the first instance, decree, that the *fidejussores* be called, and that the principal party be called, by public proclamations.[2] If the party condemned is not resident within the kingdom, the Judge may decree against the *fidejussores* without citing the principal, after the time allowed for payment has elapsed. So he may decree against the *fidejussores* to pay the sum, in such a case, after the sentence of execution shall have been demanded and the bill of costs taxed.[3] The *fidejussores* are bound notwithstanding the death of the principal.[4]

In the Admiralty Courts of the United States for the First Circuit, the decree is rendered summarily for the debt and costs adjudged against both the principal and the bail in the original bail bond, in case the bail bond has 301 been pronounced forfeited, or against the principal and his sureties, except in instance revenue causes, where there must, in certain cases, be a delay of twenty days, by the laws of Congress, before judgment can be taken on the bond. The rules, in civil causes of Admiralty jurisdiction, of the Circuit Court of the United States for the First Circuit, declare, that the condition of the bail bond shall be for the appearance of the defendant on the return day to answer to the plaintiff in the cause, and nothing is deemed a legal appearance, but a submission for commitment or giving a stipulation with sureties, according to the course of the

[1] Clerke's Prax. Tit. 64. [2] Ibid. [3] Ibid, Tit. 65.
[4] Hall's Ad. Prac. 113, *note*.

Court; and, in all proceedings *in rem*, execution issues immediately of course against all the parties to the stipulation.[1] In the District Court of the United States for the Southern District of New York, the practice in relation to the bail is different on process *in personam;* for the defendant is there held to appear in person and submit himself for commitment, or to enter into a bail stipulation with sureties to abide the orders of the Court, or deliver him-
302 self personally for commitment in the execution of the decree of the Court; and, in default thereof, execution may be issued against the sureties. (*a*)

A description cannot be given, at the present early period of the jurisprudence of the United States, of the various forms in which the decrees of the Admiralty Courts may be moulded, in the progress of the maritime business and the increase of legal refinements, in this great and growing commercial nation. Those Courts have not jurisdiction, like Courts of Chancery, over contracts leading to the execution of maritime contracts; yet, in cases of maritime contracts executed, and in all cases completely within their general jurisdiction, they may administer relief according to equity and good conscience; for they are Courts of Equity, of the Civil Law, and of the Laws of Nations.[2]

[1] Rules 3–16.

[2] Andrews et al. *v.* Essex F. and M. Ins. Co., 3 Mason R. 16.

(*a*) See Rules 21, 38, 59, Rules of 1838—Appendix.

CHAPTER XII. 303

THE COSTS.

THE costs in a suit in Admiralty depend upon the merits of the case, and are subject to the discretion of the Court.[1] (a) They are seldom decreed against seamen, except when they have instituted suits without reasonable cause. This indulgence is extended towards this class of men, on account of their inability to pay costs, and because they are peculiarly under the protection of Admiralty Courts. This is a reason, in addition to what has been before suggested, why proctors should carefully examine into the grounds of complaints made by seamen, before commencing suits; for the multiplication of frivolous suits of this class of persons cannot fail to lessen the kindly disposition cherished by Courts of Admiralty to shelter them, when they fail in their actions, from a judgment for costs, the effect of which in almost every case must be their imprisonment.

The taxed costs in Admiralty suits vary according 304
to the practice of different Districts. In the District Court of the United States for the Southern District of New York, the costs are understood to be higher than in the District Courts of the United States in New England, as the taxation is said to be regulated by an analogy to the expen-

[1] Penhallow v. Doane, 3 Dall. R. 34; The Partridge, 1 Hagg. R. 81.

(a) The United States v. Brig Malek Adhel, 2 Howard S. C. R. 210.

sive scale in the practice of the State Courts of New York. In the District Court of the United States for the District of Massachusetts, the taxable costs usually are the regular fees of the Marshal and Clerk; the commissioners' fees for taking depositions, when they are taken in the cause; the witnesses' fees, and seventeen dollars for the proctor's fees. The proctor's fees are derived by analogy from the fees allowed to the Attorney of the United States in Admiralty suits.[1] When the party resides at the place of trial, he is not allowed attendance; but when he resides at a distance he is allowed his travel and attendance. It is believed, that this is the general course of practice in taxing costs, in Admiralty cases, in the Courts of the United States in New England.

305 In extraordinary cases of great difficulty, and where a large amount of property is involved, liberal counsel fees are allowed in the Admiralty Courts of the United States, and taxed upon the fund which may be in Court accruing from the cause.

The expenses of suits in Admiralty are often a subject of remark; but it should be recollected, that they are generally occasioned by voluminous depositions, with which causes are often encumbered by the indiscreet zeal of the parties, and by custody fees and charges of keeping and disposing of ships and cargoes. In these cases the expenses are often lighter, in consequence of the control which the Court has over the charges of its officers, than would be occasioned by the same services, if rendered by commission merchants.[2]

Congress made the following provisions, in order to pre-

[1] Act of Cong. 1799, ch. 125, § 4. [2] The Hiram, Stewart's Admr. R. 588.

vent a multiplication of costs in Admiralty suits, in the Courts of the United States.

"Whenever proceedings shall be had on several libels against any vessel and cargo, which might legally be joined in one libel, before a Court of the United States, 306 or of the territories thereof, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed by the Court more costs, than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned; but allowance may be made on one libel or information for the costs incidental to several claims; *provided*, that, in case of a claim of any vessel or other property, seized on behalf of the United States, and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same upon paying only his own costs."

"Whenever causes of like nature, or relative to the same question, shall be pending before a Court of the United States, or of the territories thereof, it shall be lawful for the Court to make such orders and rules concerning proceedings therein, as may be conformable to the principles and 307 usages belonging to Courts, for avoiding unnecessary costs, or delay in the administration of justice; and accordingly causes may be consolidated as to the Court shall appear reasonable. And if any attorney, proctor, or other

person admitted to manage and conduct causes in a Court of the United States, or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the Court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of Court, to satisfy any excess of costs so incurred."[1] (*a*)

It is a general rule, that no Court can make a direct judgment or decree against the United States for costs and expenses, in a suit in which the United States is a party.[2]

[1] Act of Cong. 1813, ch. 14, § 2, 3. [2] The Antelope, 12 Wheat. R. 546.

(*a*) Act of Congress, March 3, 1847, ch. 55:

"AN ACT for the reduction of the costs and expenses in Admiralty against ships and vessels.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case brought in the Courts of the United States, exercising jurisdiction in Admiralty, where a warrant of arrest, or other process *in rem*, shall be issued, it shall be the duty of the Marshal to stay the execution of such process, or to discharge the property arrested, if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the Judge of the said Court, or, in his absence, by the Collector of the port, conditioned to abide and answer the decree of the Court in such cause; and such bond or stipulation shall be returned to the said Court, and judgment on the same, both against the principal and sureties, may be recovered at the time of rendering the decree in the original cause: Provided, That the entire costs in any such case in which the amount recovered by the libellant shall not exceed one hundred dollars, shall not be more than fifty per cent. of the amount recovered in the same, which costs shall be applied, first, to the payment of the usual fees for witnesses and the commissioner, where a commissioner shall act on the case, and the residue to be divided *pro rata* between the clerk and marshal, under the direction of the Judge of the Court where the cause may be tried: Provided further, That no attorney's or proctor's fees shall be allowed or paid out of the said costs."

Costs, in the High Court of Admiralty in England, are allowed on the desertion of an appeal.[1] In that Court they are also modified on account of the introduction, by a party, of irrelevant matter, increasing the expense of the proceedings.[2]

[1] The Elizabeth, 1 Hagg. R. 226. [2] The Apollo, ibid, 319.

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CHAPTER XIII.

THE CERTIFICATE OF REASONABLE CAUSE.

It is provided by the laws of the United States, that, upon the acquittal of property seized and libelled for forfeiture for an alleged violation of the revenue laws, if the Court, before whom the cause shall be tried, shall cause a certificate or entry to be made, that there appeared to be a reasonable cause of seizure, the seizing officer shall be protected from all costs, suits, and actions, on account of a seizure and prosecution.[1]

If the commander of a public armed ship seizes a vessel and sends her in for adjudication for an alleged violation of the laws of the United States, he will be liable for damages, unless there be a reasonable cause of seizure.[2] A doubt respecting the true construction of the law is as reasonable a cause of seizure, as a doubt respecting the fact.[3] An
309 officer of a public armed ship of the United States, who makes a seizure of a neutral vessel on the high seas for an alleged violation of the laws of the United States, may excuse himself by showing probable cause, which will exonerate him from all consequential damages; otherwise he will be liable for all damages occasioned by

[1] Act of Cong. 1799, ch. 128, § 90; Act or Cong. 1807, ch. 74; Act of Cong. 1815, ch. 246, § 7.

[2] The Charming Betsey, 2 Cranch R. 64.

[3] U. States v. Riddle, 5 Cranch R. 311; The Friendship. 1 Gall. R. 111.

the seizure.[1] Probable cause means less than evidence which would justify condemnation; and, in all cases of seizure, it has a fixed and well-known meaning, and imports circumstances which warrant suspicion.[2] If a sentence of acquittal, in a case of seizure, be rendered, and there be a denial of the certificate of reasonable cause of seizure, the seizure is established to be tortious, and the party injured is entitled to damages.[3]

A seizure for a municipal forfeiture cannot be justified or excused upon the ground of probable cause, unless some statute creates and defines the exemption from damages. The party seizing does so at his peril; if condemnation follows, he will be justified. If an acquittal takes 310
place, he will be liable for damages for the seizure, unless he can shelter himself under the protection of some statute.[4] What constitutes probable cause is, when the facts are ascertained, a question of law.[5]

Costs and damages in the British Admiralty Courts are incident to a decree of restitution of property libelled for an alleged municipal forfeiture, when the Court declines to give a certificate of probable cause of seizure.[6]

It has been decided by Dr. Croke, who was a distinguished Admiralty Judge of the British Vice-Admiralty Court at Halifax in Nova Scotia, that the Court would not

[1] Shattuck *v.* Maley, 1 Wash. C. C. R. 245; Burke *v.* Trevitt, 1 Mason R. 96.

[2] Locke *v.* U. States, 7 Cranch R. 339; The George, 1 Mason R. 24; The Fame, Stewart's Ad. R. 115.

[3] Gelston *v.* Hoyt, 3 Wheat. R. 314; The Apollon, 9 Wheat. R. 362.

[4] The Apollon, 9 Wheat. R. 373; The Palmyra, 12 Wheat. R. 1.

[5] U. States *v.* Gay, 2 Gall. R. 359. [6] The Barossa, 1 Hagg. R. 75, *note*.

debar a seizing officer from offering affidavits in support of an application for a certificate of probable cause of seizure; yet, in forming its judgment, it would take into consideration no other facts, than those which appeared at the trial of the cause. If subsequent affidavits could be introduced in relation to the certificate of probable cause, the
311 other party should have an opportunity of answering them, and a new cause would thus be commenced. It is difficult to conceive of circumstances which would amount to a probable cause of seizure, without being evidence tending to sustain the libel; but, were they otherwise, there is no impropriety in alleging and proving what would affect the costs in the suit.[1]

[1] The Fame, Stewart's Ad. R. 112.

CHAPTER XIV. 312

APPEALS.

By the laws of the United States, appeals are allowed from the District to the Circuit Court, and from the Circuit to the Supreme Court of the United States. It is provided, that,—"From all final judgments or decrees in any of the District Courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the Circuit Court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered; and the Circuit Court or Courts are authorized and required to receive, hear, and determine such appeal; and from all final judgments or decrees rendered, or to be rendered, in any Circuit Court, or in any District Court acting as a Circuit Court, in any cases of Equity, of Admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States; and, upon such appeal, a 313 transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court; and no new evidence shall be received in the said Court, on the hearing of such appeal, except in Admiralty and prize causes, and such appeals shall be subject to the same rules, regulations, and re-

strictions, as are prescribed in law in case of writs of error; and the said Supreme Court is authorized and required to receive, hear, and determine such appeals."[1]

The provisions respecting the removal of causes from the District to the Circuit Court, and from the Circuit to the Supreme Court of the United States, are as follow. "Final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a Circuit Court, holden in the same District, upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein men-
314 tioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, (a) signed by the Judge of such District Court, or a Justice of the Supreme Court, the adverse party having at least twenty days notice. And, upon a like process, may final judgment and decrees in civil actions and suits in Equity, in a Circuit Court, brought there by original process, or removed there from the Courts of the several States, or removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a Judge of such Circuit Court, or Jus-

[1] Act of Cong. 1803, ch. 93, § 2.

(a) When the appeal is prayed in open court, no citation is necessary —Brockett v. Brockett, 2 Howard's S. C. R. 241.

tice of the Supreme Court, and the adverse party having at least thirty days notice. But there shall be no reversal in either Court on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or such plea to a petition or bill in Equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be 315 an infant, *feme covert*, *non compos mentis*, or imprisoned; then within five years as aforesaid, exclusive of the time of such disability. And every Justice or Judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good.

"A writ of error as aforesaid shall be a *supersedeas*, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the Clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, execution shall not issue in any case, where a writ of error may be a *supersedeas*; and, where, upon such writ of error, the Supreme or a Circuit Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error, just damages for his delay, and single or double costs at their discretion.

"When a judgment or decree shall be reversed in a Circuit Court, such Court shall proceed to render such

316 judgment, or pass such decree, as the District Court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain; in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the Circuit Court to award execution thereupon."[1]

The words, "decrees" and "judgments," in the Act of 1803, as well as the word, "appeal," are used in a technical sense, and apply to causes of Admiralty and maritime jurisdiction only; so that causes of Admiralty jurisdiction exceeding fifty dollars in value, may, since that Act, be appealed from the District to the Circuit Court, whereas, before its passage, they must have exceeded three hundred dollars in value.[2]

The remedy by appeal is confined to Admiralty and Equity cases, and brings before the Supreme Court of 317 the United States the facts as well as the law; and thus the appellate jurisdiction of the Supreme Court is made to conform with the ancient and well-established principles of judicial proceedings.[3] The appeal suspends the sentence altogether; and the case is heard as if no sentence had been passed, it being lawful to make new allegations and proofs.[4]

[1] Act of Cong. 1789, ch. 20, § 22, 23, 24.

[2] 1 Pet. Ad. R. 121, *note*; U. States *v.* Monson, 1 Gall. R. 11.

[3] The San Pedro, 2 Wheat. R. 141.

[4] The Venus, 1 Wheat. R. 113; Clerk's Prax. Tit. 54; Hall's Ad. Prac.

The regulations respecting the time within which a writ of error may be brought, in what instances it shall be a *supersedeas*, the citation to the adverse party, the security to be given for the prosecution of the suit, and the restrictions upon the appellate Court, are applicable to appeals in Admiralty cases.[1] When an appeal is prayed at the same term in which the decree is pronounced in the Circuit Court, a citation is not necessary.[2]

The decree, from which an appeal is taken, must be final.[3] An appeal, by the general rules of Admiralty 318 practice, is not allowed on account of an admission or rejection of witnesses or testimony, or any interlocutory decree, not having the effect of a definitive sentence; because there may be relief by an appeal from the definitive sentence.[4] An appeal, however, is allowed in cases of interlocutory decrees producing an irreparable grievance, which cannot be remedied by an appeal from the definitive decree.[5] Cases of irreparable grievances are said to be, when a claim is interposed for property arrested, as belonging to the defendant, in which the ownership is asserted by a third person, and a decision is made against the claimant, or when a plea is overruled, alleging that another action is pending against the party for the same cause before a competent tribunal.[6] To these instances may be added decrees

101; Yeaton *v.* U. States, 5 Cranch R. 281; The James Wells, 7 Cranch R. 22; Hawthorn *v.* U. States, ibid, 107; The Edward, 1 Wheat. R. 261.

[1] The San Pedro, 2 Wheat. R. 132.

[2] Reily *v.* Lamar et al., 2 Cranch R. 349.

[3] Rutherford et al. *v.* Fisher et al., 4 Dall. R. 22; Canter *v.* Amer. and Ocean Ins. Co., 3 Pet. Sup. Ct. R. 307.

[4] Clerke's Prax. Tit. 54. [5] Ibid, 53. [6] Ibid, 55.

dismissing a suit on exceptions, which have the effect of a definitive sentence. (*a*)

In the British Admiralty practice upon appeals of this sort, the party in the appellate Court is confined to the proceedings of the Court, and the very acts of the Judge complained of; whereas, in an appeal from a definitive sentence, the appellant is allowed to make new allega-
319 tions and produce new evidence, *non allegata allegare et non probata probare.*[1] It is not known, that such a practice prevails in the Admiralty Courts of the United States, as an appeal from grievances; for any decree, producing what is called an irreparable grievance, it is to be presumed, would be moulded into the shape of a definitive decree, so as to enable a party to appeal according to the forms of the Statutes and the rules of the Court.[2]

[1] 2 Bro. Civ. and Ad. Law, 436. [2] Hall's Ad. Prac. 104.

(*a*) A party may appeal from an interlocutory decree, having the effect of a final decree; or he may, at his election, wait until the final decree is positively entered, and then may enter an appeal.—The Steamboat New England, 3 Sumner, 495.

A decree awarding a certain rate of salvage of the proceeds, after deducting charges and expenses, and fees of Court, is not a final decree; but at most is only an interlocutory decree, in the nature of a final decree.—The Steamboat New England, 3 Sumner, 495.

To make a decree in a salvage case positively final, all the charges and expenses should be ascertained, and the salvage apportioned, and the rights of each salvor definitely fixed, so that he may appeal therefrom if he chooses.—3 Sumner, 495.

All decrees in Admiralty are deemed to be enrolled as of the term in which they are made.—3 Sumner, 495.

A re-hearing in Admiralty cannot be had after the term of the Court has passed, at which the decree was made.—3 Sumner, 495.

No appeal lies from the refusal of the Court below to open a decree.—Brockett *v.* Brockett, 2 Howard S. C. R. 238.

The appeal cannot be allowed from the Circuit to the Supreme Court of the United States, except the matter in dispute exceeds, exclusive of costs, two thousand dollars; nor from the District to the Circuit Court, unless it exceeds, exclusive of costs, fifty dollars. When the law gives no rule to ascertain the amount of the value in controversy, the plaintiff's demand must furnish one; but when the law gives the rule, the legal cause of action, not the demand, must be regarded.[1] Affidavits and other testimony may be received to show the actual amount, in value, of the matter in dispute.[2] It has been decided, in the Cir- 320
cuit Court of the United States for the First Circuit, that, where the claim in the libel is for a larger amount than fifty dollars, and the decree of the District Court for less than that sum, and the libellant does not appeal, the respondent cannot.[3] This decision seems to give the libellant an advantage over the respondent, for, in such a case, he can appeal if dissatisfied with the decree. When the judgment in the Court below, in a case sounding in damages, is for the plaintiff, the judgment fixes the amount of the value in dispute; but when it is for the defendant, the Supreme Court of the United States has not, by any rule or practice, fixed the mode of ascertaining that value.[4] In a suit in the District Court, for a personal injury on the high seas, when there is no *ad damnum*, there should be no decree for more than fifty dollars, and no appeal should be

[1] Wilson *v.* Daniel, 3 Dall. R. 401.

[2] Williamson *v.* Kincaid, 4 Dall. R. 20; The Brig Union, 4 Cranch R. 216. [3] Titus *v.* Shirley, 1 Sumner R.

[4] Cooke et al. *v.* Woodson, 5 Cranch R. 13.

allowed.[1] The value in controversy, in relation to the right of appeal, is the value of the property at the time of the seizure, without any deduction for duties.[2]

321 In an appeal from the Circuit to the Supreme Court of the United States, the property does not follow the cause upon the appeal, but remains subject to the orders of the Circuit Court. The property does, however, follow the cause, on appeal, into the Circuit Court, and the District Court, in such case, has no control over it.[3]

If an appeal be not taken from the principal final decree, it cannot be taken from the summary judgment on the bond for the appraised value, or on an Admiralty stipulation to enforce the decree, which are mere incidents to the cause.[4] An appeal from the decree of the District Court must be taken before the adjournment of the Court *sine die*, unless a different period be prescribed by the District Court, which may, by rules, regulate the practice in cases of appeals.[5] (*a*)

When an appeal is made by the respondent, and none is made by the libellant, if the respondent does not pre-
322 vail, the former decree will be affirmed, and, in a case of salvage, there can be no larger allowance made, than in the inferior Court; for the decree can be examined on appeal only so far as the party appealing is affected.[6]

[1] Jenks *v.* Lewis, 3 Mason R. 503.
[2] U. States *v.* Eighty-four Boxes of Sugar, 7 Pet. Sup. Ct. R. 453.
[3] The Collector, 6 Wheat. R. 194; The Grotius, 1 Gall. R. 503.
[4] The Hollen, 1 Mason R. 431.
[5] Norton *v.* Rich, 3 Mason R. 443.
[6] The Mary Ford, 3 Dall. R. 188.

(*a*) The Steamboat New England, 3 Sumner R. 495.

The decree of the inferior Court is conclusive upon a party, who does not appeal from the judgment.[1]

The party appellant is required to give fresh security to prosecute the appeal and pay the costs; for the sureties in the Court, from whose decree the appeal is made, are not bound in the cause of appeal.[2] (*a*)

In the Admiralty practice of the Courts of the United States, the defendant who does not appeal is not required to find new security, when the plaintiff appeals; nor are his sureties considered to be discharged, for they are bound by all legal dispositions of the cause.

It is said by Dr. Browne, that, unless otherwise directed, the proctor should appeal from a definitive sentence; and that, if he neglects, he will be liable to his client for all damages, which may ensue.[3] This is not consid- 323
ered to be the law in the United States; and proctors, watching with vigilant attention their clients' interests, will be protected in acting according to their own judgments, unless specially directed to appeal. This rests upon the general principle of law in the United States, that an attorney, unless specially directed by his client to pursue a particular course, will be protected, when he acts in good faith, according to the best of his skill and knowledge, in relation

[1] Stratton *v.* Jarvis et al., 8 Pet. Sup. Ct. R. 4.
[2] 2 Bro. Civ. and Ad. Law, 437. [3] Ibid.

(*a*) Where there are many parties in a case below, it is not necessary for them all to join in an appeal bond. It is sufficient if they all appeal, and the bond be approved by the Court.—Brockett *v.* Brockett, 2 Howard S. C. R. 240.

to the management of professional business committed to his care.[1]

In the High Court of Admiralty in England, when a sentence is reversed upon appeal, it is not usual to condemn the party in costs, except under very special circumstances.[2] Upon the desertion of an appeal, costs are allowed in that Court.[3] It is, also, the course there, when an appeal is not prosecuted, to move for a decree, pronouncing the appeal to be deserted.[4]

324 In the British Admiralty practice, the party appealing prays apostles from the Judge, which are brief letters of dismission, stating the case, and declaring that the record will be transmitted.[5] It is not known, that this practice has been ever adopted in the Admiralty Courts of the United States. With us, appeals are sometimes claimed *vivâ voce*; but the most correct course is a formal claim in writing. If the appeal be entered at the appellate Court, the cause proceeds as has been before described; and, if not entered and prosecuted, the appellee may obtain a decree of desertion of appeal and affirmation of the judgment of the inferior Court, and also a judgment for his costs against the sureties in the appeal stipulation.

It is not settled in the Admiralty practice, whether a cause, which has once been closed, can be re-opened by a Libel of Review, as in Chancery by a Bill of Review. There seems to be as strong reasons for the possession of this power, in order to do justice, by a Court of Admiralty, as by a Court of Chancery. In the High Court of Admiralty

[1] Gilbert *v.* Williams, 8 Mass. R. 57. [2] The John, 2 Hagg. R. 317.
[3] The Elizabeth, 1 Hagg. R. 226.
[4] The San Juan Nepomuceno, 1 Hagg. R. 267.
[5] 2 Bro. Civ. and Ad. Law, 438.

in England, an opinion has been expressed, that the 325
Court, in its range of large discretion, and by the very extended equity which it is in the habit of exercising, might, in a case of direct fraud, or something equivalent to it, suffer a cause which had been once closed to be re-opened; but there must be strong reasons, and mere negligence or oversight would not be a sufficient ground for this extraordinary interposition.[1] A case occurred in the practice of the author of this work, where he would have made the experiment of a Libel of Review in the Admiralty, had it not been adjusted. The facts present a strong case of the necessity of such a proceeding. A mate libelled a ship for his wages in the District Court of Massachusetts. The owners, in defence, contended that two bales of cotton, part of the cargo, had been lost by his negligence, and that the value should be deducted from his wages. The Judge considered him accountable for one bale, and decreed him his wages deducting its value. Afterwards that bale was found in a store, where the cargo had been deposited. Upon these facts, it seems proper that the libellant should have a
right to review the cause; for he was not bound to re- 326
ceive that bale of cotton as his property, which might have depreciated in value, or to bring an action at law for it, in which the judgment might never be satisfied. He had a lien upon the ship for the whole of his wages, which he was not bound to relinquish; and the only mode in which that lien could have been enforced, was by a Libel of Review in the Admiralty.[2]

[1] The Fortitudo, 2 Dods. R. 70.

[2] See The Malta, 2 Hagg. R. 168; Sheppard et al. v. Taylor et al., 5 Pet. Sup. Ct. R. 675; The Neptune, 1 Hagg. R. 227.

There are two cases in which a Bill of Review in Chancery may be brought; and they are settled in the Ordinances of Lord Chancellor Bacon, which have never since been departed from. Those Ordinances provide, that "no Bill of Review shall be admitted," except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made; nevertheless, upon new proof, that is come to light after the decree was made, which could not possibly have been
327 used at the time when the decree passed, a Bill of Review may be grounded by the special license of the Court, and not otherwise.[1]

[1] Cooper's Plead. in Equity, 89.

(a) On this subject, Judge Story remarks, "If the District Court has a right to entertain a Libel of Review in any case, it must be limited to very special cases; and either where no appeal by law lies, because the matter is less in value than is required by law to justify an appeal, or the proper time for any appeal has passed, and the decree remains unexecuted; or where there is clear error in matter at law; or if not, where the decree has been obtained by fraud; or where new facts, changing the entire merits, have been discovered since the decree was passed, and there has been not only the highest good faith, but also the highest diligence and an entire absence of just imputations of negligence; and finally, where the principles of justice and equity require such an interference, to prevent a manifest wrong."—The Steamboat New England, 3 Sumner R. 505.

The High Court of Admiralty in England has power to vary its own decrees. Such variation should be confined to an alteration of an error arising from a defect of knowledge or information upon a particular point in the case, and the error must be brought to the attention of the Court with the utmost possible diligence.—The Monarch, 1 Wm. Robinson R. 21.

Act March 3. 1797

CHAPTER XV. 328

THE REMISSION OF FORFEITURES.

A PROVISION is made, in the laws of the United States, for the remission of forfeitures in certain cases. The Act of Congress in relation to this subject, declares as follows:

"That, whenever any person or persons, who shall have incurred any fine, penalty, forfeiture, or disability, or shall have been interested in any vessel, goods, wares, or merchandise, which shall have been subject to any seizure, forfeiture, or disability, by force of any present or future law of the United States for the laying, levying, or collecting any duties or taxes, or by force of any present or future act concerning the registering or recording of ships or vessels, or any act concerning the enrolling and licensing ships or vessels employed in the coasting trade or fisheries, and for regulating the same, shall prefer his petition to the Judge of the District in which such fine, penalty, forfeiture, or disability shall have accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same be mitigated or remitted, the said Judge shall inquire, in a 329
summary manner, into the circumstances of the case; first causing reasonable notice to be given to the person or persons claiming such fine, penalty, or forfeiture, and to the Attorney of the United States for such District, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts

which shall appear upon such inquiry, to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury of the United States; who shall thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence, or any intention of fraud, in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just.

"That the Judicial Courts of the several States, to whom, by any of the said acts, a jurisdiction is given, shall and may exercise all and every power, in the cases cognizable before them, for the purpose of obtaining a mitigation
330 or remission of any fine, penalty, or forfeiture, which may be exercised by the Judges of the District Courts in cases depending before them.

"That nothing herein contained shall be construed to affect the right or claim of any person to that part of any fine, penalty, or forfeiture incurred by the breach of any of the laws aforesaid, which such person shall or may be entitled to by virtue of the said laws, in cases where a prosecution has been commenced, or information has been given, before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties, or forfeitures; the amount of which right and claim shall be assessed and valued by the proper Judge, or Court, in a summary manner."[1]

[1] Act of Cong. 1797, ch. 67.

Upon this Act of Congress, there have been several decisions in the Courts of the United States.

The Secretary of the Treasury has authority to remit a forfeiture both before and after condemnation, until the money is actually paid over to the Collector, who instituted the prosecution, for distribution.[1] The remission extends to the shares of the Custom House officers and 331 informer, as well as to the interest of the United States in the forfeiture.[2] But the Secretary of the Treasury has no power to remit forfeitures, except in cases provided for by law.[3] Under the Act of Congress on this subject, the District Judge is required, upon a petition for a remission of a forfeiture, to state, in his report of the facts to the Secretary of the Treasury, not the evidence of the facts, but the facts which he considers to be proved; and in making his statements, he acts judicially, and the proof must be by competent and credible testimony.[4] A statement by the District Judge, merely that the claimant deposed to the facts, is not legal proof.[5] It is not competent for any other tribunal collaterally to call in question the competency of the evidence, or its sufficiency to procure the remission. The Secretary of the Treasury is, by law, the sole Judge upon these facts, and there is no appeal from his decision; and, when the statement of the facts is received by him from the District Judge, he has the power to remit the forfeiture, if, in his opinion, it has been incurred without wilful negli- 332 gence or any intention of fraud.[6] The refusal of the

[1] U. States *v.* Morris. 10 Wheat. R. 246; Id., 1 Paine R. 209. [2] Ibid.
[3] The Margaretta, 2 Gall. R. 515. [4] Ibid. [5] Ibid.
[6] U. States *v.* Morris, 10 Wheat. R. 283.

Secretary of the Treasury to remit a forfeiture is not considered by the Court in the trial of the cause.[1]

An opinion has been suggested, by the learned Judge of the District Court for the Northern District of New York, in his valuable work upon the practice of that Court, that even after the payment of the money, accruing from a forfeiture and condemnation, into the treasury, the Secretary may remit, upon a petition under the remission Act, the share of the United States.[2] Petitions in such cases have sometimes been presented to the District Judge of Massachusetts; but no instance is known, in which the proceedings upon such a petition have been so far maintained, as to be transmitted to the Secretary of the Treasury. The same writer also suggests, that, in a case highly favorable to a petitioner, the District Judge would probably order a temporary stay of proceedings against the property libelled, in order to afford an opportunity of making an application, under the remission Act, to the Secretary of the Treasury.[3]

333 The petition should be addressed to the Judge of the District Court; and it should state fully and particularly the circumstances under which the forfeiture was incurred, and the grounds upon which the relief is sought. It is like a bill in Equity to obtain relief against a judgment at law, and it should contain a distinct averment, that the petitioner has not been guilty of "wilful negligence, or any intention of fraud." It is usually supported by the oath of the petitioner, although this is not required by the

[1] The Cotton Planter, 1 Paine R. 23. [2] Conkling's Prac. 391.
[3] Ibid, 392.

Act of Congress.[1] When the petition is sworn to, the affidavit should be made before a Judge of some Court of the United States, or a commissioner authorized by the laws of the United States to take affidavits and depositions.[2] The notice, required by the Act of Congress to be given to the persons claiming the forfeiture, may be given either before or after the petition is presented.[3] In the two Districts of New York, a copy of the petition is required to be served upon the Collector and District Attorney, with a notice of the time and place of the examination.[4] In the District of Massachusetts, the petition is usually exhibited to the Collector and District Attorney, who are verbally in- 334 formed by the Marshal of the time and place fixed for the hearing, of which service a regular return is made to the District Judge. As a prosecution for a forfeiture is generally instituted in the name of the United States, and in behalf of the Collector who is alleged to have made the seizure, the notice is generally served upon the District Attorney and the Collector.[5]

It is suggested by the learned author above referred to, that the rule laid down in the Circuit Court of the United States for the First Circuit, that the proof must be competent testimony, and that the petitioner's declaration under oath should not be admitted, is too strict, and calculated to render the Act of Congress wholly illusory. He is of the opinion, that the claimant's declaration, when there does not appear any thing suspicious, and when it cannot be in any manner contradicted, should be taken to be true, and trans-

[1] Conkling's Prac. 392. [2] Ibid. [3] Ibid, 393. [4] Ibid.
[5] Ibid, 396.

mitted to the Secretary of the Treasury; and he also suggests, that the practice in both the Districts of New York is conformable to these views.[1]

The District Judge, at the time appointed by him
335 for the hearing, proceeds to the examination of the case.

If the Collector and District Attorney have been regularly notified, their attendance or neglect to attend is noted. The Judge, at the hearing, or subsequently, prepares a statement of the facts which he considers to have been established, and the proceedings are transmitted by the Clerk, in the name of the Judge, and under the seal of the District Court, to the Secretary of the Treasury.[2] When the Secretary of the Treasury has decided either to grant or refuse the remission of the forfeiture, a warrant is issued from the Treasury Department and sent to the Clerk of the Court, containing the decision of the Secretary. If the decision be in favor of the remission prayed for, it is a bar to any farther proceedings, and the property seized is immediately restored. When a prosecution has taken place, and the property libelled is consequently in the actual or constructive custody of the Court, a warrant of delivery is issued by the Clerk for its restoration. It is a condition generally annexed to a remission of the forfeiture, that the costs shall be paid by the petitioner.

It has sometimes happened, when a petition for a
336 remission of a forfeiture has been pending before the

Secretary of the Treasury, that Custom House officers, and other persons interested in the cause, have addressed letters and transmitted affidavits to the Secretary, in order

[1] Conkling's Prac. 396 - 398. [2] Ibid, 400.

to influence his decision. This is a piece of gross impertinence, disrespectful to the Secretary and to the Judge; for it is the duty of the District Judge to make a statement of the facts, and it is the duty of the Secretary to decide upon that statement.

Some Secretaries of the Treasury have refused to act upon a petition for a remission of a forfeiture, unless there had been a judgment at law, or the forfeiture were expressly admitted to have been incurred, upon the grounds, that the Act of Congress only applies to cases where forfeitures have been incurred, and that proceedings upon a petition for a remission are calculated to embarrass the District Judge and the Secretary of the Treasury, when, in case of a refusal to grant the remission, subsequent proceedings at law are intended. The Judge of the District Court of the United States for the District of Massachusetts, whose great experience entitles his opinions to the highest consideration, maintains this doctrine, and declines to act upon a petition for a remission, unless all proceedings at law 337 have been determined, or the forfeiture be admitted in the petition to have been incurred. The highest consideration is due to the opinions of this learned and venerable Admiralty Judge, who, by doing "justice for truth's sake and his conscience," through his long judicial course, has fully realized the wish of Cardinal Wolsey respecting Sir Thomas More, upon his elevation to the office of Lord Chancellor. It is a gratification to the author, to finish his work with a respectful allusion to the Judge, to whom it is inscribed, in the commencement, without compliment and in the most simple form of dedication. The reader will excuse the in-

dulgence of this feeling, when informed, that whatever of practical knowledge of Admiralty law the author may possess, has been chiefly acquired in the discharge of professional duties before this Judge, with whom he has, also, as the Law Officer of the United States for the District of Massachusetts, been officially connected for the last six years.

Appendix.

PART I.

STATUTES.

FEES OF MARSHAL AND CLERK.

An Act making appropriations for the civil and diplomatic expenses of the Government for the year eighteen hundred and forty-one.

Passed March 3, 1841.

For defraying the expenses of the Supreme, Circuit, and District Courts of the United States, including the District of Columbia; also for jurors and witnesses, in aid of the funds arising from fines, penalties, and forfeitures, incurred in the year eighteen hundred and forty-one, and preceding years; and likewise for defraying the expenses of suits in which the United States are concerned, and of prosecutions for offences committed against the United States, and for the safe-keeping of prisoners, three hundred and twenty-five thousand dollars: *Provided, however,* That hereafter, in lieu of all fees, emoluments, and receipts not allowed in districts where the present entire compensation of any of

the officers hereinafter named shall exceed the sum of one thousand five hundred dollars per annum, it shall and may be lawful for the United States' clerks, attorneys, counsel, and marshals, in the district and circuit courts of the United States in the several States, to demand and receive the same fees that now are, or hereafter may be, allowed by the laws of the said States respectively where said courts are held, to the clerks, attorneys, and counsel, and sheriffs, in the highest courts of the said States in which like services are rendered; and no other fees or emoluments, except that the marshals shall receive in full, for summoning all the jurors for any one court, thirty dollars; and shall receive, for every day's actual attendance at any court, five dollars per day; and for any services, including the compensation for mileage, performed by said officers in the discharge of their official duty, for which no compensation is provided by the laws of said States respectively, the said officers may receive such fees as are now allowed by law according to the existing usage and practice of said courts of the United States; and every district attorney, except the district attorney of the southern district of New York, shall receive, in addition to the above fees, a salary of two hundred dollars per annum: *Provided*, That the fees and emoluments retained by the district attorneys, marshals, and clerks, exclusive of any reasonable compensation to their deputies, to be allowed in their accounts by the courts of the respective districts to which they belong, and after the payment of such necessary office and other expenses as shall be allowed by the Secretary of the Treasury, not to exceed, as to any one of the said offices in the southern district of New York, the sum of three thousand dollars per annum, and in any other district, the sum of one thousand dollars per annum, shall in no case exceed, for the district attorneys and the marshals, or either of them, the sum of six thousand dollars for each; and those for each of the clerks

shall not exceed, in any case, four thousand five hundred dollars; the overplus of fees and emoluments to be paid into the public Treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury, subject to the disposition of Congress.

COMMISSIONERS TO ACT AS MAGISTRATES, &c.

An Act further supplementary to an act entitled, "An act to establish the judicial courts of the United States," passed the 24th of September, 1789.

Passed August 23, 1842.

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act of the twenty-fourth of September, Anno Domini seventeen hundred and eighty-nine, entitled, "An act to establish the judicial courts of the United States;" and who shall and may exercise all the powers that any judge or justice of the peace may exercise under and in virtue of the sixth section of the act passed the twentieth of July, Anno Domini seventeen hundred and ninety, entitled "An act for the government and regulation of seamen in the merchant service."

SEC. 2. And be it further enacted, That in all hearings before any justice or judge of the United States, or any commissioner appointed as aforesaid, under and in virtue of the said thirty-third section of the act entitled, "An act to establish the judicial courts of the United States," it shall be lawful for such justice, judge, or commissioner, where the crime or offence is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion, to require a recognizance of any witness produced in behalf of the accused, with such surety or sureties as he may judge necessary, as well as in behalf of the United States, for their appearing and giving testimony, at the trial of the cause, whose testimony, in his opinion, is important for the purposes of justice at the trial of the cause, and is in danger of being otherwise lost; and such witnesses shall be entitled to receive from the United States the usual compensation allowed to Government witnesses for their detention and attendance, if they shall appear and be ready to give testimony at the trial.

SEC. 3. And be it further enacted, That the district courts of the United States shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital. And in such of the districts where the business of the court may require it to be done for the purposes of justice, and to prevent undue expenses and delays in the trial of criminal causes, the said district courts shall hold monthly adjournments of the regular terms thereof for the trial and hearing of such causes.

SEC. 4. And be it further enacted, That, in lieu of the punishment now prescribed by the sixteenth section of the act of Congress, entitled, "An act for the punishment of certain crimes against the United States," passed on the thirtieth day of April, Anno Domini one thousand seven hundred

and ninety, for the offences in the said section mentioned, the punishment of the offender, upon conviction thereof, shall be by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the nature and aggravation of the offence.

SEC. 5. And be it further enacted, That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make and direct, and award, all such process, commissions, and interlocutory orders, rules, and other proceedings, whenever the same are not grantable of course according to the rules and practice of the court.

SEC. 6. And be it further enacted, That the Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinct-

ness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

SEC. 7. And be it further enacted, That, for the purpose of further diminishing the costs and expenses in suits and proceedings in the said courts, the Supreme Court shall have full power and authority, from time to time, to make and prescribe regulations to the said district and circuit courts, as to the taxation and payment of costs in all suits and proceedings therein; and to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other officers serving process, to witnesses, and to all other persons whose services are usually taxable in bills of costs. And the items so stated in the said table, and none others, shall be taxable or allowed in bills of costs; and they shall be fixed as low as they reasonably can be, with a due regard to the nature of the duties and services which shall be performed by the various officers and persons aforesaid, and shall in no case exceed the costs and expenses now authorized, where the same are provided for by existing laws.

SEC. 8. And be it further enacted, That on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed, and may be levied by the marshal, under process of execution issued thereon, in all cases where, by the law of the State in which such circuit or district court shall be held, interest may be levied under process of execution on judgments recovered in the courts of such State, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such State.

ADMIRALTY RULES.

Rules of the Supreme Court of the U. States in Admiralty.

RULES OF PRACTICE

Of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction on the Instance Side of the Court, in pursuance of the Act of Congress of August 23, 1842, *ch.* 188.

RULE I.

No *mesne process* shall issue from the District Court in any civil cause of admiralty and maritime jurisdiction, until the libel or libel of information shall be filed in the clerk's office, from which such process is to issue. All process shall be served by the marshal or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court.

RULE II.

In suits *in personam*, the *mesne process* may be by a simple warrant of arrest of the person of the defendant in the nature of a *capias*, or by a warrant of arrest of the person of the defendant with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or, by a simple monition in the na-

ture of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for, to elect.

RULE III.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the party arrested by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein, in the court, to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal, by the appellate court.

RULE IV.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable to enforce the final decree so rendered, or upon appeal, by the appellate court.

RULE V.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take

affidavits and bail, and depositions in cases pending before the court.

RULE VI.

In all suits *in personam*, where bail is taken, the court may, upon motion for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor: and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

RULE VII.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof.

RULE VIII.

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances, are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing the same is required by law and justice.

RULE IX.

In all cases of seizure and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other things to be arrested, and the marshal shall thereupon ar-

rest and take the ship, goods or other things into his possession for safe custody; and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the District Court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

RULE X.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay or injury, by being detained in custody, pending the suit, the court may, upon the application of either party, in its discretion, order the same, or so much thereof, to be sold, as shall be perishable or liable to depreciation, decay or injury, and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court, to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with the sureties in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

RULE XI.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as aforesaid; and if the claimant shall decline any such application, then the court may in its

discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.

RULE XII.

In all suits by material men for supplies or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, or other necessaries.

RULE XIII.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*.

RULE XIV.

In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*.

RULE XV.

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*.

RULE XVI.

In all suits for an assault or beating on the high seas or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

RULE XVII.

In all suits against the ship or freight founded upon a

mere maritime hypothecation, either express or implied, of the master for moneys taken up in a foreign port for supplies or repairs, or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*.

RULE XVIII.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property in whosesoever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter case the suit may be *in personam* against the wrongdoer.

RULE XIX.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

RULE XX.

In all petitory or possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

RULE XXI.

In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fieri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree: and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court.

RULE XXII.

All informations and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States; and the district within which the property is brought, and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

RULE XXIII.

All libels in instance causes, civil or maritime, shall state the nature of the cause, as, for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of

salvage, or of possession, or otherwise, as the case may be; and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of the process to enforce his rights *in rem*, or *in personam*, (as the case may require,) and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

RULE XXIV.

In all information and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time on motion, to the court as of course. And new counts may be filed and amendments in matters of substance may be made, upon motion at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

RULE XXV.

In all cases of libels *in personam*, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses,

which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit.

RULE XXVI.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.

RULE XXVII.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel; and shall also answer in like manner each interrogatory propounded at the close of the libel.

RULE XXVIII.

The libellant may except to the sufficiency or fullness or distinctness or relevancy of the answer to the article and interrogatories in the libel; and if the court shall adjudge the same exceptions or any of them to be good and valid, the court shall order the defendant forthwith, within such

time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

RULE XXIX.

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may in its discretion set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

RULE XXX.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly, to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

RULE XXXI.

The defendant may object by his answer to answer any allegation or interrogatory contained in the libel, which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penalty offence.

RULE XXXII.

The defendant shall have a right to require the personal answer of the libellant, upon oath or solemn affirmation, to any interrogatories which he may at the close of his answer propound to the libellant touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture, as is provided in the 31st Rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

RULE XXXIII.

Where either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

RULE XXXIV.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem*, for his own interest, and he is entitled, according to the course of admiralty proceedings to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required by order of the court to make due answer, and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall apper-

tain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

RULE XXXV.

Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits and bail, and also depositions in civil causes pending in the courts of the United States.

RULE XXXVI.

Exceptions may be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence or scandal, and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

RULE XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits or effects, the same shall be held in his hands liable to answer the exigency of the suit.

RULE XXXVIII.

In cases of mariner's wages, or bottomry, or salvage, or other proceedings *in rem*, where freight, or other proceeds

of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause, why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

RULE XXXIX.

If in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

RULE XL.

The court may in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which on account of his contumacy and default the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

RULE XLI.

All sales of property under any decree in admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the

registry of the court by the officer making the sale, to be disposed of by the court according to law.

RULE XLII.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by a check or checks signed by a judge of the court, and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book containing a memorandum and copy of all the checks so drawn and the date thereof.

RULE XLIII.

Any person having an interest in any proceeds in the registry of the court, shall have a right by petition and summary proceedings to intervene *per interesse suo*, for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice; and if such petition or claim shall be deserted, or upon a hearing be dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

RULE XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

RULE XLV.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit.

RULE XLVI.

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of said courts respectively, in such manner as they shall deem most expedient for the administration of justice in suits in admiralty.

RULE XLVII.

These rules shall be in force in all the circuit and district courts of the United States from and after the first day of September next.

It is ordered by the court, that the foregoing rules be and they are adopted and promulgated as rules for the regulation and government of the practice of the circuit courts and district courts of the United States in suits in admiralty on the instance side of the courts; and that the reporter of the court do cause the same to be published in the next volume of his reports; and that he do cause such additional copies thereof to be published, as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

RULES OF THE SUPREME COURT.

Rules of Practice of the Supreme Court of the United States.

RULES AND ORDERS.

1.—February 3, 1790.

Ordered, That John Tucker, Esq., of Boston, be the Clerk of this Court.

That he reside and keep his office at the seat of the National Government, and that he do not practice either as an Attorney or Counsellor in this Court while he shall continue to be Clerk of the same.

2.—February 5, 1790.

Ordered, That (until further orders) it shall be requisite to the admission of Attorneys or Counsellors to practice in this Court, that they shall have been such for three years past in the Supreme Court of the State to which they respectively belong, and that their private and professional character shall appear to be fair.

3.—February 5, 1790.

Ordered, That Counsellors shall not practice as Attorneys, nor Attorneys as Counsellors, in this Court. (*See Rule* 14.)

4.—February 5, 1790.

Ordered, That they shall respectively take the following

oath, viz: "I, ————, do solemnly swear that I will demean myself (as an Attorney or Counsellor of the Court) uprightly, and according to law; and that I will support the Constitution of the United States." (*See Rule* 6.)

5.—February 5, 1790.

Ordered, That (unless and until it shall otherwise be provided by law) all process of this Court shall be in the name of the President of the United States.

6.—February 7, 1791.

Ordered, That the Counsellors and Attorneys admitted to practice in this Court, shall take either an oath, or in proper cases, an affirmation, of the tenor prescribed by the rule of this Court on that subject, made February Term, 1790, viz: "I, ————, do solemnly swear, (or affirm, as the case may be,) that I will demean myself, as an Attorney or Counsellor of this Court, uprightly, and according to law; and that I will support the Constitution of the United States."

7.—August 8, 1791.

The Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the Bar, that this Court consider the practice of the Courts of King's Bench, and of Chancery, in England, as affording outlines for the practice of this Court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

8.—February 4, 1795.

The Court gave notice to the gentlemen of the Bar, that hereafter they will expect to be furnished with a statement of the material points of the case from the Counsel on each side of a cause. (*See Rule* 29.)

9.—February 17, 1795.

The Court declared, that all evidence on motion for a

discharge upon bail must be by way of *deposition*, and not *viva voce*.

10.—August 12, 1796.

Ordered, That when process at Common Law, or in Equity, shall issue against a State, the same shall be served on the Governor, or Chief Executive Magistrate and Attorney General of such State.

Ordered, That process of subpœna, issuing out of this Court, in any suit in Equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

11.—February 13, 1797.

It is ordered by the Court, that the Clerk of the Court to which any writ of error shall be directed, make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the Court. (*See Rule* 35.)

12.—August 7, 1797.

It is ordered by the Court, that no record of the Court be suffered by the Clerk to be taken out of his office, but by the consent of the Court; otherwise, to be responsible for it. (*See Rule* 35.)

13.—August 15, 1800.

IN THE CASE OF COURSE *vs.* STEAD'S EXECUTORS.

Ordered, That the plaintiff in error be at liberty to show, to the satisfaction of this Court, that the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs; this to be made appear by affidavit, on ——— days' notice to the opposite party, or their Counsel, in Georgia.

Rule as to affidavits to be mutual.

14.—August 12, 1801.

Ordered, That Counsellors may be admitted as Attorneys in this Court on taking the usual oath. (*See Rule* 3.)

15.—December 9, 1801.

It is ordered, That in every case where the defendant in error fails to appear, the plaintiff may proceed *ex parte*. (*See Rules* 19 *and* 30.)

16.—February Term, 1803.

It is ordered, That where the writ of error issues within thirty days before the meeting of the Court, the defendant in error is at liberty to enter his appearance, and proceed to trial; otherwise, the cause must be continued. (*See Rules* 19 *and* 30.)

17.—February Term, 1803.

In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per ànnum* on the amount of the judgment. (*See Rule* 20.)

18.—February Term, 1803.

In such cases, where there exists a real controversy, the damages shall be only at the rate of *six per centum per annum*. In both cases the interest is to be computed as part of the damages. (*See Rule* 20.)

19.—February Term, 1806.

All causes, the records in which shall be delivered to the Clerk on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of that term, either party will be entitled to a continuance. In all cases where a writ of error shall be a supersedeas to a judgment rendered in any Circuit Court of the United States, except

that for the District of Columbia, at least thirty days previous to the commencement of any term of this Court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the Clerk of this Court within the first six days of the term; and if he shall fail so to do, the defendant in error shall be permitted afterwards to lodge a copy of the record with the Clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the Clerk, stating the cause, and that a writ of error has been sued out, which operates as a supersedeas to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the Court for the District of Columbia at any time prior to a session of this Court.

In cases not put in issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court at the commencement of the term, or so soon thereafter as the record shall be filed with the Clerk, and the cause placed on the docket; and if he shall fail so to do, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause; and that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance. In such a case *costs go of course.* Montalet *vs.* Murray. (*See Rules* 30 *and* 43.)

20.— February Term, 1807.

It is ordered, That where damages are given by the rule

passed in February term, 1803, the said damages shall be calculated to the day of the affirmance of the judgment in this Court. (*See Rules* 17 *and* 18.)

21.—FEBRUARY TERM, 1808.

1st. *Ordered*, That all parties of this Court, not being residents of the United States, shall give security for the costs accruing in this Court, to be entered on the record.

2d. *Ordered*, That upon the Clerk of this Court producing satisfactory evidence, by affidavit, or the acknowledgment of the parties or their sureties, of having served a copy of the bill of costs due by them respectively, in this Court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs.

22.—FEBRUARY TERM, 1810.

Ordered, That upon the reversal of a judgment or decree of the Circuit Court, the party in whose favor the reversal is shall recover his costs in the Circuit Court.

23.—FEBRUARY TERM, 1812.

It is ordered, That only two Counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

24.—FEBRUARY TERM, 1812.

There having been two Associate Justices of the Court appointed since its last session, *It is ordered*, that the following allotment be made of the Chief Justice and the Associate Justices of the said Supreme Court, among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered on record, viz:

For the first circuit—the HON. JOSEPH STORY.

*For the second circuit—the HON. BROCKHOLST LIVINGSTON.

*The Honorable SMITH THOMPSON having been appointed Associate Ju

For the third circuit—the HON. BUSHROD WASHINGTON.
For the fourth circuit—the HON. GABRIEL DUVALL.
For the fifth circuit—the HON. JOHN MARSHALL, *C. J.*
For the sixth circuit—the HON. WILLIAM JOHNSON.
For the seventh circuit—the HON. THOMAS TODD.

25.—FEBRUARY TERM, 1816.

It is ordered by the Court, That in all cases where further proof is ordered by the Court, the depositions which shall be taken shall be by a commission to be issued from this Court, or from any Circuit Court of the United States. (*See Rule* 27.)

26.—FEBRUARY TERM, 1817.

Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

27.—FEBRUARY TERM, 1817.

In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this Court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission,

tice of the Supreme Court, in the place of the Honorable BROCKHOLST LIVINGSTON, deceased, the President of the United States assigned to him the second circuit, by an instrument dated the day of A. D. one thousand eight hundred and twenty-three.

and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice: *Provided, however*, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible. (*See Rule* 25.)

28.—FEBRUARY TERM, 1821.

Whenever, pending a writ of error or appeal in this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous: *Provided, however*, that a copy of every such order shall be printed in some newspaper at the seat of Government in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.—*March* 8, 1821.

29.—FEBRUARY TERM, 1821.

Ordered, After the present term no cause standing for argument will be heard by the Court until the parties shall have furnished the court with a printed brief or abstract of the cause, containing the substance of all the material

pleadings, facts, and documents on which the parties rely, and the points of law and fact intended to be presented at the argument.—*March* 10, 1821. (*See Rule* 8.)

30.—FEBRUARY TERM, 1821.

In all cases where a writ of error or an appeal shall be brought to this Court from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the Clerk of this Court within the first six days of the term; on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the Clerk, and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term; or at his option he may have the cause docketed and dismissed, upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed. —*March* 14, 1821. (*See Rules* 19 *and* 43.)

31.—MARCH 14, 1823.

No cause will hereafter be heard until a complete record, containing in itself, without reference *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this Court, shall be filed. (*See Rule* 11.)

32.—FEBRUARY TERM, 1824.

No certiorari for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made

at the first term of the entry of the cause; otherwise, the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay.

33.—FEBRUARY TERM, 1824.

In all cases of equity and admiralty jurisdiction heard in this Court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the Court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

34.—FEBRUARY TERM, 1824.

(*Rescinded.*)—On Saturday of each week during the sitting of the Court, motions in cases not required by the rules of the Court to be put upon the docket shall be entitled to preference, if such motions shall be made before the Court shall have entered upon the hearing of a cause upon the docket. (*See Rule* 50.)

35.—FEBRUARY TERM, 1825.

Ordered, That after the present term no original record shall be taken from the Supreme Court Room, or from the office of the Clerk of this Court.—*Feb.* 19. (*See Rule* 12.)

36.—JANUARY TERM, 1830.

The Court, on the second day in each term hereafter, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term, in the same order; and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the Court.

That ten causes only shall be considered as liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the Court. Every cause which shall have been twice called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

37.—January Term, 1831.

1. In all cases the Clerk shall take of the plaintiff a bond with competent security, to respond to costs, in the penalty of two hundred dollars; or a deposite of that amount to be placed in bank subject to his draft.

2. In all cases the Clerk shall have fifteen copies of the records printed for the Court, provided the Government will admit the item in the expenses of the Court.

3. In all cases the Clerk shall deliver a copy of the printed record to each party. And in cases of dismission (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff, which charge includes the charge for the copy furnished him.

In case of reversal and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

38.—January Term, 1832.

It is ordered by the Court. That hereafter the Judges of the Circuit and District Courts do not allow any bill of exceptions, which shall contain the charge of the Court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such

matters of law, and those only, be inserted in the bill of exceptions, and allowed by the Court.

39.—JANUARY TERM, 1833.

1. *It is ordered by the Court*, That during the session of the Court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the Law Library, shall be at liberty, upon application to the Clerk of the Court, to receive an order to take the same (not exceeding at any one time three) from the Library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the Clerk. And it shall be the duty of the Clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. *It is ordered by the Court*, That during the session of the Court, any Judge thereof may take from the Law Library any book or books he may think proper, he being responsible for the due return thereof.

40.—JANUARY TERM, 1833.

Whereas, It has been represented to the Court that it would in many cases accommodate Counsel, and save expense to parties, to submit causes upon printed arguments. It is therefore

Ordered, That in all cases brought here on appeal, writ of error, or otherwise, the Court will receive printed arguments, if the Counsel on either or both sides shall choose so to submit the same. (*See Rules* 44 *and* 51.)

41.—1834.

Ordered, That the original opinions of the Court, de-

livered to the reporter, be filed in the office of the Clerk of the Court for preservation as soon as the volume of Reports for the term, at which they are delivered, shall be published.

42.—1835.

All the opinions delivered by the Court since the commencement of the term shall be forthwith delivered over to the Clerk to be recorded.

And all opinions hereafter delivered by the Court shall immediately, upon the delivery thereof, be in like manner delivered over to the Clerk to be recorded. And it shall be the duty of the Clerk to cause the same to be forthwith recorded, and to deliver the originals with a transcript of the judgment or decree of the Court thereon to the reporter, as soon as the same shall be recorded.

And all the opinions of the Court, as far as practicable, be recorded during the term, so that the publication of the reports may not be delayed thereby.

43.—1835.

1. In all cases where a writ of error, or an appeal, shall be brought to this Court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause and file the record thereof with the Clerk of this Court within the first six days of the term. If he shall fail so to do, the defendant in error, or appellee, as the case may be, may docket the cause and file a copy of the record with the Clerk, in which case it shall stand for argument at the term; or at his option he may have the cause docketed and dismissed upon producing a certificate from the Clerk of the Court, wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.

2. No writ of error or appeal shall be docketed, or the record of the cause filed by the plaintiff in error, or appellant, after the first six days of the term, except upon the terms that the cause shall stand for argument during the term, or be continued at the option of the defendant in error, or appellee. But in no case shall the plaintiff in error, or appellant, be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed in the manner provided for in the preceding rule, unless by order of the Court or with the consent of the opposite party.

3. In all cases where the cause shall not be docketed, and the record filed with the Clerk by either party until after thirty days from the commencement of the term, the cause shall stand continued until the next term. (*See Rules* 19 *and* 30.)

44.—1837.

When a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by Counsel. (*See Rule* 51.)

45.—1838.

In all cases where any suit shall be dismissed in this Court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

In all cases of affirmance of any judgment or decree in this Court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the Court.

In all cases of reversals of any judgment or decree in this Court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this Court for the plaintiff

in error, or appellant, as the case may be, unless otherwise ordered by the Court.

Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this Court for or against the United States.

In all cases of the dismissal of any suit in this Court, it shall be the duty of the Clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain.

When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate or other proper process, sent to the Court below, and annex to the same the bill of items taxed in detail.

46.—1838.

All motions hereafter made to the Court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

47.—1838.

The Court will, at every future session, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the Court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

48.—1841.

Ordered, That the Clerk take charge of the books of the Court, together with such of the duplicate law books as Congress may direct to be transferred to the Court, and arrange them in the Conference room, which he shall have fitted up in a proper manner; and that he do not permit such

books to be taken therefrom, by any one, except the judges of the Court.

49.—1842.

(*Rescinded.*)—*Ordered*, That printed arguments will not be received under the fortieth rule of the Court, unless filed within forty days from the commencement of the Term, except in cases which are reached in the regular call of the docket. (*See Rule* 52.)

50.—December Term, 1844.

Ordered, That the Court will not hear arguments on Saturday, (unless for special cause it shall order to the contrary,) but will devote that day to the other business of the Court; and that on Friday in each week, during the sitting of the Court, motions in cases not required by the Rules of the Court to be put on the docket shall be entitled to preference, if such motions shall be made before the Court shall have entered on the hearing of a cause upon the docket; and the Rule No. 34, adopted at February Term, 1824, be, and the same is hereby, rescinded.

51.—December Term, 1844.

Ordered, That no printed or written argument be hereafter received, unless the same shall be signed by an attorney or counsellor of this court.

52.—December Term, 1844.

Ordered, That printed arguments, under the fortieth Rule, will be received hereafter, and at the present Term, until the first Monday in February in each and every term, while the Supreme Court continues to meet on the first Monday in December; and that the forty-ninth rule of the Court, adopted at January Term, 1842, be, and the same is hereby, rescinded.

53.

Ordered, That no counsel will be permitted to speak, on the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins.

Counsel will not be heard, unless a printed abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them, arranged under their respective points, and no other book or case can be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte*, upon the argument of the party by whom the statement is filed.

This rule to take effect on the first day of December Term, 1849.

54.—December Term, 1849.

Ordered, That where an appearance is not entered on the record for either the plaintiff or defendant on or before the second day of the term next succeeding that at which the case is docketed, it shall be dismissed at the costs of the plaintiff.

55.

Ordered, When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

DISTRICT COURT RULES.

Rules of the District Court of the United States for the Southern District of New York.

[The following rules of the District Court for the Southern District of New York, were adopted in 1838. Many of them are superseded by the New Rules in Admiralty of the Supreme Court of the United States, made in pursuance of the Act of Congress, passed August 23, 1842.]

Rule 1.

A libel, information, or petition, must state plainly the facts upon which relief is sought, without any repetitions or amplification of charges.

Rule 2.

No process shall issue until the pleading or statement in writing upon which it is allowed be duly filed.

Rule 3.

Libels, (except on behalf of the United States,) praying an attachment *in personam* or *in rem*, or demanding the answer of any party on oath, shall be verified by oath, or affirmation.

Rule 4.

The oath, or affirmation, of the party himself, in all cases where one is necessary, shall be required to pleadings filed in his name, except as is hereafter otherwise provided, or as shall be specially ordered by the judge.

RULE 5.

Libels, informations, or petitions, praying a monition or citation only without attachment, need not be sworn to.

RULE 6.

Libels, and other proceedings, to be filed, shall be plainly and fairly engrossed, without erasures or interlineations materially defacing them. If papers not conforming to this Rule are offered, the clerk shall require the *allocatur* of the judge to be endorsed thereon before he receives them on the files.

RULE 7.

Amendments, or supplementary matters, must be connected with the libel or other pleading by appropriate references, without a recapitulation or restatement of the pleading amended or added to.

RULE 8.

In suits for seamen's wages, any mariner in the same voyage not made a party, may by short petition to the Court in any stage of the cause previous to the final distribution of the fund in Court, or discharge of the defendant and his sureties, be joined as libellant in the cause, but no costs shall be allowed for the proceedings taken to make him a party.

RULE 9.

The proctor in the original cause shall not, however, be compelled to proceed in behalf of such petitioning mariner, unless a reasonable indemnity is offered for such costs as may be incurred in consequence of his being joined in the cause.

RULE 10.

In case of salvage and other causes civil and maritime,

persons entitled to participate in the recovery, but not made parties in the original libel, may, upon petition, be admitted to prosecute as co-libellants on such terms as the Court may deem reasonable.

RULE 11.

Process on libels or informations may be made returnable on any day at a stated or special term, but writs for the sale of property under any order or decree of the Court, and all final process, shall be returnable at a stated term, unless upon cause shown, an earlier day is specially appointed by the judge.

RULE 12.

Tuesday of each week is appointed as a special sessions of the Court, (except the stated term be then in session,) at which the same proceedings may be taken, in causes of admiralty and maritime jurisdiction, as at a stated term.

RULE 13.

Process to be used in commencing suits shall be a *citation* or *monition;* an *attachment in rem*, united with a *monition*, or, by special allowance of the judge, with an *attachment in personam;* an *attachment in personam* and *a writ of foreign attachment.*

RULE 14.

Where no specific process is provided by the Rules, parties may have such process as is in use in like cases in the Supreme Court of the State.

RULE 15.

Where it is not desired to arrest a defendant, the clerk on filing a libel or information may, at the instance of the actor, issue a citation or monition, according to the usage in civil and admiralty proceedings.

RULE 16.

No process *in personam* for the arrest of any person, in cases of torts or unliquidated damages, shall issue, except upon the mandate of the judge.

RULE 17.

In cases of liquidated damages, when the certainty and amount of the demand appear upon the face of the libel, an attachment *in personam* may be issued by the clerk without an order. The attachment shall plainly express the cause of action and the amount of the demand, and the clerk shall endorse thereon the sum for which bail is required, not exceeding one hundred dollars above the sum sworn to be due and unpaid; but no attachment or citation shall be issued until the libellant shall have filed a stipulation for costs in the sum of one hundred dollars.

RULE 18.

On the return of a citation or warrant by the marshal, "*served personally*," the party shall be deemed in Court, and may be proceeded against accordingly.

RULE 19.

When the citation or monition in suits *in personam* is not served personally, the libellant may at his election pursue the defendant to a decree of contumacy, in which decree may be embraced an order for the attachment of the defendant as for contempt of process; or, on verifying by oath the matters demanded by the libel, the libellant may have an attachment *in personam instanter*, on the return of the citation "*not served*."

RULE 20.

In the latter case all subsequent proceedings may be as if the attachment had been sued out in the first instance.

Rule 21.

On warrants to arrest the person in admiralty and maritime causes, the marshal may take bail in the form of a stipulation, and in the sum endorsed on the warrant, conditioned for the appearance of the party on the return day to answer to the libellant in a cause civil and maritime according to the course of the Court.

Rule 22.

The sureties having made oath thereon to their sufficiency, and the bail stipulation being filed, it shall have the same effect in favor of the actor and against the defendant as if taken in Court; and the marshal shall be deemed discharged of all personal responsibility for the appearance of the respondent.

Rule 23.

In case the marshal does not file such stipulation, or the sureties, being required, refuse to justify, like proceedings may be taken to compel the marshal to bring in the party, as if no stipulation had been entered into.

Rule 24.

The condition of the stipulation shall be deemed satisfied if the party shall appear in person on the return day of the warrant and submit himself for commitment, or enter into the usual stipulation in the case, according to the course of the court.

Rule 25.

If a party against whom a warrant of arrest issues cannot be found and return thereof be made, the plaintiff may upon the mandate of the judge have a warrant to attach the property of the defendant, and may also have inserted therein a clause of foreign attachment, according to the course of the admiralty.

RULE 26.

In all cases of attachment under admiralty process to compel an appearance, the attachment may be dissolved on the party's giving a stipulation with sureties, to the same effect as in cases of arrest.

RULE 27.

In cases of foreign attachment, if the defendant appear, the same proceedings may be had as is usual in suits *in personam*, and if he make default, the court will proceed *ex parte*, and pronounce the proper decree, unless the attachment is discharged at the instance of the garnishee.

RULE 28.

Process cannot issue against goods, *choses in action* or moneys in the hands of third persons, except by the order of the judge and upon due proof of the claim first made; and the names of such persons and also of the persons whose effects are to be attached, together with a specification of such effects, shall be expressed in the process.

RULE 29.

On the service of the attachment by arrest of property, the parties holding the property or funds attached, shall on the return day of such process file an affidavit containing a full and true statement of the property or funds in their hands belonging to the principal party at the time the attachment was served and at the time the deposition is made, and declare whether they have any, and if any, what claim to any and what part thereof; and shall then, on motion of the actor, pay into court such amount as they shall not claim, or as may be ordered by the court, or give stipulation, with sufficient surety, to abide the further order or decree of the court in relation thereto; and on their default in this behalf a rule may be entered that an attachment issue against them unless they shall show cause in four days or on the first day the court is in session afterwards.

RULE 30.

When the property, effects or credits named in the process are not delivered up to the marshal by the garnishee or trustee, or are denied by him to be the property of the party, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such trustee, or at his residence or usual place of business, unless the libellant shall by competent surety indemnify the marshal for arresting the property pointed out to him.

RULE 31.

On the return by the marshal of service of such attachment by notice and copy with the reason thereof, the libellant may move the court for a peremptory attachment or such order as the equity of the case may demand; or on proof satisfactory to the court that the property, &c. belongs to the defendant, may proceed to a hearing and final decree in the cause as if the property had been held in arrest.

RULE 32.

All process to the marshal shall be returned on the return day thereof, and if he shall not return the same in four days after being required in writing so to do, by any party or his proctor, upon affidavit of such requirement and of the delivery of the process to him, an order may be entered of course that he show cause why an attachment shall not issue against him; and in the case of process *in rem*, the return of the marshal shall express the day of the seizure of the property or the day of sale, if a process for that object.

RULE 33.

No process shall be received on file unless duly returned by the officer to whom directed.

RULE 34.

In case the court is not in session at the return of process requiring to be acted on in open court, proceedings shall be

deemed continued to the next sitting of the court, (either stated or special,) at which time the like proceedings may be had thereupon as if then returnable.

RULE 35.

On proclamation after due return of process, the libellant shall be entitled to a decree of default or contumacy, according to the nature of the case, and the three proclamations heretofore used are abolished.

RULE 36.

In case of the attachment of property, or the arrest of the person in causes of civil and admiralty jurisdiction, (except in suits for seamen's wages when the attachment is issued upon certificate pursuant to the act of Congress of July 20, 1790,) the party arrested, or any person having a right to intervene in respect to the thing attached, may upon evidence showing any improper practices or a manifest want of equity on the part of the libellant, have a mandate from the judge for the libellant to show cause *instanter* why the arrest or attachment should not be vacated.

RULE 37.

Stipulations may be taken, in admiralty and maritime causes out of court before the clerk or a commissioner, under a *dedimus potestatem*. The officer taking the stipulation shall, if examined by the opposite party, examine the sureties on oath and decide as to their competency. An appeal may be taken *instanter* to the judge, in case the decision is against the sufficiency of the sureties.

RULE 38.

The conditions of stipulations in causes *in personam* shall be that the principal, whenever required by this court or an appellate court in case of appeal, shall appear and answer to the cause or to interrogatories, and pay all costs that may

Intended as in S. S. Ct Rule 3

be decreed against him, and by the respondent or defendant that he will also perform and abide all orders and decrees in the cause interlocutory or final, or deliver himself personally for commitment in execution of such orders, to the proper officer.

RULE 39.

The amount of stipulations on the part of the defendants in causes *in personam*, shall be the sum endorsed on the warrant, and *in rem* on the delivery of property attached the appraised or agreed value of the property seized, unless the sum in either case is modified or enlarged by order of the court.

RULE 40.

Application may be made instanter to the judge after an arrest *in personam*, to mitigate the amount of the bail stipulation; and like application may be made at any time after property has been delivered on bail stipulation, upon facts occurring after such delivery, to discharge such stipulation, or to reduce the amount according to the equity of the case, previous notice of the application having been given the proctor of the libellant.

RULE 41.

Two days' notice shall be given the proctor of the libellant, of applications for delivering up on stipulation property under attachment, specifying the sureties intended to be given and their occupations and places of residence, and the officer before whom and the place where the stipulation will be offered, except in suits by seamen for wages, when such notice may be *instanter*.

RULE 42.

The stipulation or bond to be given upon releasing and delivering up property arrested by process of the court, shall

be conditioned that the claimant and his sureties shall at any time, upon the interlocutory order or decree of the court, or of any appellate court to which the cause may proceed, and on notice of such order to the proctor of the party to whom the property shall have been delivered, bring into court the appraised or agreed value of such property or any part thereof so ordered or decreed. If no proctor is employed by such party, the order or decree shall be deemed peremptory two days after the same is entered.

Rule 43.

The clerk shall provide a book in which shall be registered all stipulations filed in causes civil and admiralty, which shall be open to the examination of all parties interested.

Rule 44.

No process *in rem* shall be issued, nor shall any appearance or answer be received or third party be permitted to intervene and claim, (except on the part of the United States,) unless a stipulation in the sum of two hundred and fifty dollars shall be first entered into by the party and at least one surety resident in the district, conditioned that the principal shall pay all costs awarded against him by this court, or in case of appeal, by the appellate court.

Rule 45.

But seamen suing *in rem* and *in personam* for wages in their own right and for their own benefit for services on board American vessels, and salvors coming into port in possession of the property libelled, shall not be required to give such security in the first instance. The court on motion with notice to the libellants may, after the arrest of the property, for adequate cause order the usual stipulation to be given in these cases, or that the property arrested be discharged.

RULE 46.

Notice of the arrest of property by attachment *in rem*, in behalf of individual suitors, shall be published and affixed in the manner directed by act of Congress in cases of seizures on the part of the United States, except when the judge by special order directs a shorter notice than fourteen days; and except that, instead of the substance of the libel, a short statement of its purport may be given.

RULE 47.

Notice of the sale of property after condemnation in suits *in rem*, (except under the revenue laws and on seizure by the United States,) shall be six days, unless otherwise specially directed in the decree of condemnation and sale.

RULE 48.

All such notices shall be published in the manner directed by act of Congress, in the case of condemnation under the revenue laws.

RULE 49.

The marshal shall be allowed, (in conformity to the former usage of the court,) one dollar and fifty cents per day for the custody of a vessel, her tackle, apparel and furniture, seized by any officer of the revenue, and seized, libelled and prosecuted for forfeiture.

RULE 50.

He shall be allowed for the custody of goods so seized, on all sums not exceeding $5000, held in custody less than thirty days, two per cent.; on all sums exceeding $5000, held in custody less than thirty days, one per cent.; on all sums not exceeding $5000, held in custody over thirty days, two and a half per cent.; and on all sums exceeding $5000, held in custody over thirty days, one and a half per cent.; except on attachment of specie, bullion, jewelry or precious stones, the allowance to the marshal shall be specifically fixed by

the court, having regard to the special circumstances of each case.

RULE 51.

The marshal may have like allowances taxed on all other attachments of property in causes of civil and admiralty jurisdiction.

RULE 52.

All the above allowances are, however, subject to alteration by the court on motion, due notice thereof being given the opposite party and adequate cause being shown therefor.

RULE 53.

The allowance to the marshal above appointed for the custody of goods, shall be computed upon the gross proceeds in case of sale; or upon the appraised or agreed value if bonded: but the marshal, in case of an agreed valuation between the parties not assented to by him, may have an appraisement in the usual mode.

RULE 54.

If attachments *in rem* are accompanied by written instructions to the marshal, specifying the sum demanded, (adding thereto $250 to cover costs,) he shall, as in case of executions, only arrest so much of the goods or effects to be seized (when severable) as shall be sufficient to satisfy such amounts.

RULE 55.

In all cases of stipulations in civil and admiralty causes, any party having an interest in the subject matter may move the court, on special cause shown, for greater or better security, giving the opposite party two days' notice thereof, unless a shorter time is allowed by order of the judge.

RULE 56.

After a citation or monition or warrant of arrest in suits *in personam* returned "*served personally*," if the defendant

do not appear at the return day he shall be deemed in contumacy and in default, and the libellant may take order for enforcement of the stipulation, (in case any is given,) or to compel the defendant's appearance, according to the course of Admiralty proceedings: or at his option may proceed to hearing *ex parte*, and obtain the proper decree, unless the court, for good cause, shall allow the defendant further time.

RULE 57.

In suits *in personam*, stipulators to the marshal on the arrest of the defendant may be discharged from their stipulation on the surrender of the principal, as in cases of bail at law.

RULE 58.

So also stipulators or *fide-jussores* after the return of the attachment, in suits *in personam*, may surrender their principal, or he may surrender himself, in discharge of the stipulation, as in cases of special bail at law: except in respect to costs in this court, or any other court to which the cause may be appealed.

RULE 59.

All stipulations in causes civil and maritime shall be executed by the principal party, (if within the district,) and at least one surety resident therein, and shall contain the consent of the stipulators, that in case of default or contumacy on the part of the principal or sureties, execution to the amount named in such stipulation may issue against the goods, chattels and lands of the stipulators.

The court will modify the execution as to the time it may stay and the amount to be collected, according to the equity of the case. Non-resident parties must supply at least two sureties.

RULE 60.

In case of seizure of property in behalf of the United States,

an appraisement for the purpose of bonding the same may be had by any party in interest, on giving one day's previous notice of motion before the court, or the judge, in vacation, for the appointment of appraisers.

RULE 61.

If the parties, or their proctors, and the district attorney, are present in court, such motion may be made *instanter* after seizure and without previous notice.

RULE 62.

Orders for the appraisement of property under arrest, at the suit of an individual, may be entered of course by the clerk at the instance of any party interested therein, or upon filing the consent of the proctors for the respective parties.

RULE 63.

Only one appraiser is to be appointed in suits by individuals, unless otherwise specially ordered by the judge, and if the respective parties do not agree in writing upon the appraiser to be appointed, the clerk shall forthwith name him, either party having a right of appeal *instanter* to the judge from such nomination, for adequate cause.

RULE 64.

In case vessels, their tackle or appurtenances, are to be appraised, the clerk shall name a warden of the port, and in case of merchandise, an appraiser or an assistant appraiser of the custom house, as appraiser.

RULE 65.

In suits *in rem* for seamen's wages, and in all other actions *in rem* for sums certain, the claimant or respondent may pay into court the amount sworn to be due in the libel, with interest computed thereon from the time it was due to the stated term next succeeding the return day of the attachment, and the costs of the officers of court already accrued,

together with the sum of $250 to cover further costs, &c., &c.; or, at his option, may give stipulation to pay such sworn amount with interest, costs and damages, (first paying into court the costs of the officers of court already accrued,) and in either case may thereupon have an order entered *instanter* for delivery of the property arrested—without having the same appraised.

RULE 66.

Appraisers, before executing their trust, shall be sworn or affirmed to its faithful discharge before the clerk or his deputy, (who are hereby appointed commissioners for the qualification of appraisers,) and shall give one day's previous notice of the time and place of making the appraisement, by affixing the same in a conspicuous place adjacent to the United States' Courts Rooms, and where the marshal usually affixes his notices, to the end that all persons concerned may be informed thereof, and the appraisement when made shall be returned to the clerk's office.

RULE 67.

Appraisers acting under an order of this court shall be severally entitled to three dollars for each day necessarily employed in making the appraisement; to be paid by the party at whose instance the same shall be ordered.

RULE 68.

No vessels, goods, wares or merchandise in the custody of the marshal shall be released from detention upon appraisement and surety, until the costs and charges of the officers of this court, so far as the same shall have accrued, shall first be paid into court by the party at whose instance the appraisement shall take place, to abide the decision of the court in respect to such costs.

RULE 69.

No property in the custody of any officer of the court shall

be delivered up without the order of the court; but such order may be entered of course by the clerk on filing a written consent thereto by the proctor in whose behalf it is detained: and also, after appraisement and bond duly executed.

RULE 70.

If in *possessory* suits, after decrees for either party, the other shall make application to the court for a proceeding in a *petitory* suit, and file the proper stipulation, the property shall not be delivered over to the prevailing party until after an appraisement made, nor until he shall give a stipulation, with sureties, to restore the same property, without waste, in case his adversary shall prevail in the petitory suit, and also to abide as well all interlocutory orders and decrees, as the final sentence and decree of the District Court, and on appeal, of the appellate court.

RULE 71.

In all cases where a judgment or *decree* is entered on a bond or stipulation filed with the clerk for the appraised or agreed value of any property libelled in this court, the clerk shall receive in addition to the amount of the bond, interest at the rate of six per cent. per annum, for the time which shall intervene between the entry of the judgment, or date of the stipulation, and the day when the money shall be paid into court.

RULE 72.

A tender *inter partes* shall be of no avail on defence or in discharge of costs, unless on suit brought, and before answer, plea or claim filed, the same tender is deposited in court to abide the order or decree to be made in the matter.

RULE 73.

When tender is first made, after suit brought, it must include taxable costs then accrued.

RULE 74.

No third party can intervene by claim without proof of a subsisting interest in the subject matter of the claim. This proof may, in the first instance, be the oath of the claimant, but subject to denial and disproof on the part of the libellant, on issue thereto or on summary petition.

RULE 75.

Double pleas, or exceptions, replications to pleas, triplications or rejoinders, &c., may be filed without previous leave of the court, the pleading of several matters being restricted to cases in which the matters are distinct.

RULE 76.

Defence may be made by answer or claim, of matters of law or fact, without the employment of exceptions or special pleas usual in causes of civil and maritime jurisdiction, other than exceptions to the competency of the party, or the process or other matter of abatement.

RULE 77.

If matter of bar at law to the libel is set up by answer or claim and allowed by the court, no costs shall be taxed for any other part of the answer or claim than that stating such bar.

RULE 78.

When the answer alleges a bar in law to the whole libel, it may be treated as a plea and set down for hearing, without filing a replication other than to such bar or going into proofs upon the issues in fact.

RULE 79.

Where a party not required to answer intervenes by claim and answer, costs will be taxed for the claims only.

RULE 80.

When an answer is required in a suit *in rem* of a party having no interest in the subject matter, he may file an exceptive allegation or disclaimer, and notice the same *instanter* for hearing. If the decree of the court is an affirmance of his plea, he shall be discharged the action with costs.

RULE 81.

One improperly joined as defendant in an action *in personam*, may have a decree of discharge in the same manner; provided, it is made satisfactorily to appear to the court that he can give material testimony as a witness in the cause.

RULE 82.

When the claim is in derogation of the right set up by the libel, it may form a general issue therewith by denying "that the libellant is entitled to the remedy and relief in the premises sought by him," without traversing or admitting the several articles of the libel.

RULE 83.

A general issue may be taken by answer in like manner when the answer is not required to be under oath.

RULE 84.

So also the libel may be contested affirmatively by a general issue instead of a formal demurrer.

RULE 85.

When a general issue is taken to the libel in open court on the return day of process, either party may have the cause placed upon the calendar *instanter*, and it may be called in its place for proofs without other notice.

RULE 86.

Each party is entitled to like proceedings in such case, as

if the cause had been noticed by each, pursuant to the usual practice.

RULE 87.

A sworn answer is not to be deemed higher evidence than the libel or information to which it responds, unless made so by the act of the promovent. An answer need not be put in under oath unless so required by a sworn libel, or one filed by the United States.

RULE 88.

The matter set up by a sworn answer responsive to the allegations or interrogatories of the libel, shall be deemed admitted on the part of the libellant, unless within four days from the time the answer is perfected, or from the expiration of the time allowed for excepting thereto, replication is filed, or a written notice served on the proctor of the respondent, that on the trial of the cause proof will be offered on the part of the libellant in opposition to the allegations of the answer. No replication need be filed for any other purpose, to an answer taking an issue in fact upon the allegations of the libel.

RULE 89.

A claim or answer may be put in and filed at any time after the service of process and before default is entered: and when it shall be put in at any other time than on making proclamation, notice of the time of filing it shall be given to the libellant, otherwise he shall not be bound to regard it.

RULE 90.

If separate answers or claims are put in by the same proctor, or by different proctors being connected in business, all costs thereby unnecessarily incurred shall be disallowed on taxation.

Rule 91.

An answer or claim on the part of the United States is to be put in without oath by the district attorney, and is not subject to exception for insufficiency.

Rule 92.

In the case of bailable process *in personam*, unless the defendant appear and put in bail stipulation according to the rules of the court, his claim or answer may be treated as a nullity, and his defaults be entered. An answer in such case shall be deemed filed from the time bail becomes perfected.

Rule 93.

On due proof that a claimant or respondent is absent from the United States, or resides out of the district, and more than one hundred miles from the city of New York, a claim or answer to a libel may be sworn to by a proctor or attorney in fact in behalf of such party. And if thereupon the libellant, by written notice to the respondent, demands a personal answer, verified by the oath of the party, proceedings shall stay a reasonable time to enable such answer to be taken by commission or *dedimus potestatem*.

The provisions of this rule may also be applied to the verification of a libel, by the oath of a proctor or attorney in fact.

Rule 94.

The defendant may on the return day of process and before answering, demurring or pleading, file an exception to the libel that is multifarious or ambiguous, or without plain allegations upon which issue can be taken, and if it be adjudged by the court insufficient for any of these causes, and be not amended by the libellant within two days thereafter, it shall be dismissed with costs.

RULE 95.

Proceedings upon such exceptions shall conform to those on exceptions to answers or other pleadings.

RULE 96.

The libellant may, within four days from the filing of the answer or claim, file exceptions thereto for insufficiency, irrelevancy or scandal, which exceptions shall briefly and clearly specify the parts excepted to by the line and page of the papers in the clerk's office: whereupon the party answering or claiming shall in four days either give notice to the libellant of his submitting to the exceptions, or set down the exceptions for hearing, and give four days notice thereof for the earliest day of jurisdiction afterwards. In default whereof the like order may be entered as if the exceptions had been allowed by the court.

RULE 97.

If a party submit to exceptions for insufficiency, he shall answer further within four days after notice of his submitting. If the exceptions are allowed on hearing, he shall answer further within such time as the court shall direct; and if the hearing of the exceptions shall not be duly brought on, or the further answer duly put in, the claim or answer excepted to shall be treated as a nullity, and the default of the party be entered.

RULE 98.

If exceptions for irrelevancy be submitted to, or be allowed by the court, or the hearing be not duly brought on by the respondent, the matter excepted to shall be struck out of the claim or answer by the clerk.

RULE 99.

Either party may propound interrogatories to the other, within four days from the putting in of the claim, or an-

swer, or other pleading, and the perfecting of the same, if excepted to.

RULE 100.

A copy of the interrogatories shall be served on the party for whom the same are intended, or his proctor, if one be employed; and if he object thereto, he shall notify the party serving the same, who shall on due notice submit the same to the judge for his allowance. The interrogatories allowed shall be filed with the clerk, and notice thereof be given, and the party shall file his answer thereto in ten days after such notice; in default whereof, if libellant, the libel shall be dismissed; if claimant or defendant, the claim or answer shall be treated as a nullity, and default may be entered against such party.

RULE 101.

Answers to interrogatories may be excepted to in the same manner as answers or claims put in by a defendant, and shall, in all respects, be subject to the provisions of the rules in relation to exceptions; and if the libellant making answers shall not perfect the same after exception, the libel shall be dismissed for want of prosecution. But this rule and the preceding one shall not in any case be deemed to require answers to interrogatories on the part of the United States in suits brought in their behalf.

RULE 102.

The oath of calumny shall not be required of any party in any stage of a cause.

RULE 103.

Suits may be joined or consolidated upon the same principle as in the practice of the court at common law.

RULE 104.

When various actions are pending, all resting upon the

same matter of right or defence, the court by order at its discretion, will compel the parties to abide by the decision rendered in one case, and will enter a decree in the other causes conformably thereto, although there be no common interest between the parties.

RULE 105.

Commissions for taking testimony, if not sued out pursuant to the rules of the circuit court, shall be moved for in four days after the claim or answer is filed and perfected, (if the same shall have been excepted to,) but if interrogatories shall be propounded for the other party, by the party who moves for a commission, he shall have four days for moving after the answers to the interrogatories shall be perfected, otherwise such commissions shall not operate to stay proceedings; but, on a proper case shown, application for a commission may be made at any time after the action is commenced and before issue joined, or after a default or interlocutory decree.

RULE 106.

Affidavits on which a motion for a commission is made, shall specify the facts expected to be proved, and the shortest time within which the party believes the testimony may be taken and the commission returned.

RULE 107.

A commission will not be allowed to stay proceedings, if the opposite party admits in writing that the witnesses will depose to the facts stated in such affidavit; such affidavit, with the admission, may be read on the trial or hearing, and will have the same effect as a deposition to those facts by the witness or witnesses named.

RULE 108.

The motion may be noticed and made at term before the court, or in vacation before the judge out of court; and only

one commissioner will be named, unless special cause is shown for appointing a greater number, nor will costs be taxed for the services of more than one, except where both parties require a greater number.

RULE 109.

Interrogatories for the direct and cross-examination, in case the parties disagree respecting them, shall be presented to the judge for his allowance at one time, and one day's notice of such reference shall be given by the party objecting to the opposite interrogatories.

RULE 110.

Cross interrogatories shall be served within four days after the direct have been received, or they shall be regarded as assented to, and if no notice of reference to the judge is given within five days after both direct and cross interrogatories have been served, each party shall be deemed to have assented to the interrogatories served.

RULE 111.

The interrogatories, direct and cross, as agreed to by the parties or settled by the judge, shall be annexed to the commission.

RULE 112.

Directions as to the execution and return of the commission, signed by the clerk and the proctor of the party moving it, or of both parties, if both unite in the commission, or if both propose interrogatories, shall accompany the commission.

RULE 113.

Depositions taken under commissions or otherwise, shall be forwarded to the clerk immediately after they are taken, and be filed on their return to the clerk's office in term or vacation, and notice thereof shall be forthwith given by the

party filing them, to the proctor of the opposite party. And all objections to the form or manner in which they were taken or returned, shall be deemed waived, unless such objections shall be specified in writing in four days after the same are opened, unless further time shall be granted by the judge.

RULE 114.

In suits between individuals, either may at any time after the commissions or depositions are deposited with the clerk, enter an order of course as of a special sessions, if in vacation, to open the same, and deliver copies thereof.

RULE 115.

In suits on seizures in which the United States are a party, such order may be entered on the written consent of the proctors or attorneys of the respective parties, or on motion to the court at a stated or special session.

RULE 116.

Opening such commissions or depositions shall not preclude either party from objecting to the competency or relevancy of the evidence when offered on trial.

RULE 117.

Exceptive allegations to the credibility or competency of witnesses examined on deposition or commission, may be filed within four days after the depositions or commissions are opened at the clerk's office, and notice shall be given forthwith of such exceptions.

RULE 118.

Testimony impeaching or supporting the witnesses may in such case be given by the parties respectively, on the hearing of the cause, and may be taken in the same manner as proofs in chief.

RULE 119.

Depositions *in perpetuam rei memoriam* to be used in this court, may be taken under a *dedimus potestatem*, or by any officer authorized by act of Congress to take depositions *de bene esse*, to be used in the Courts of the United States, in like cases and by like proceedings as is now authorized by the Supreme Court of the state of New York.

RULE 120.

Notices of trial, argument or hearing, may be for any day in term, the court being then sitting, (including days to which the court may stand adjourned,) upon a sufficient excuse for not giving notice for the first day of the term.

RULE 121.

In all issues brought to trial, argument or hearing, except as provided in these Rules, *four days* previous notice shall be served on the attorney or proctor of the opposite party, when the attorney or proctor resides in this city; in all other cases, affixing such notice conspicuously in the clerk's office shall be a sufficient service.

RULE 122.

A note of the pleadings and of the date of the issue shall be served on the clerk, with a notice of the hearing, four days before the time of hearing, and such notices shall also specify the pleadings, and whatever papers or documents in his office shall be required by the parties to be produced by the clerk at the trial.

RULE 123.

So soon as issue is joined, the respondent or claimant may notice the cause for hearing on his part, and be thereupon entitled to a decree dismissing the same with costs, or such other decree as the case may demand, unless the libellant shall also notice the cause for the same time, and

proceed to trial or hearing, or obtain a continuance by order of the court, on proper cause shown.

RULE 124.

When either party shall require *viva voce* testimony given in open court, to be taken down by the clerk pursuant to the act of Congress, it shall be taken in the same manner as in jury trials on common law issues, and not *verbatim*, as in depositions *de bene esse*.

RULE 125.

The notes of the judge may, by assent of parties, be used as if taken down by the clerk.

RULE 126.

Either party, desiring to diminish, vary or enlarge the minutes of proofs taken by the clerk or judge, may, within two days after the trial, serve a statement of proofs on the proctor of the opposite party, and such statement, if assented to, or if no amendments are proposed thereto within two days thereafter by such proctor, shall be regarded the true minute of the testimony given, and the notes of the judge or clerk be corrected in conformity thereto.

RULE 127.

If amendments are proposed, and the parties do not agree therein, the statements and amendments shall be forthwith referred to the judge, and he shall settle or determine how the facts are, and the statement thus settled or adjusted shall be filed as the true minutes of the testimony given.

RULE 128.

In cases of demands, arising not *ex delicto*, on a decree in favor of the libellant by default, or on hearing, it shall be referred to the clerk to compute and ascertain the amount due the libellant, but reference may also be made in cases

of tort, or on allegations of incidental or consequential damages, if desired by either party.

RULE 129.

In case of the absence of the clerk, or his incompetency from interest or otherwise, or upon any sufficient cause shown, such reference may be made to assessors or otherwise, according to the course and custom of courts of civil and admiralty jurisdiction.

RULE 130.

On such reference either party may produce and use the pleadings and proofs filed in the cause or heard in court, and other competent proofs pertinent to the matter of reference.

RULE 131.

The clerk shall allow neither party longer than ten days from the order of reference to complete the proofs thereon, without the special order of the judge.

RULE 132.

At the instance of either party the clerk shall report the additional testimony received by him, and the offer of testimony rejected (if any) by him.

RULE 133.

Either party may except to the clerk's report, and set down the exceptions for hearing, on two days' notice, at the first stated or special sessions after the report is filed.

RULE 134.

Upon the coming in of the report a decree of confirmation may be entered on motion without notice, unless otherwise ordered by the court, or the report shall be excepted to; and in the latter case, the exception shall be overruled or held

abandoned, unless brought to a hearing the first stated or special sessions of the court for which it can be noticed.

RULE 135.

If the libellant takes no proceedings upon the report within four days after the filing thereof in open court, the respondent may move the court to dismiss the libel for want of due prosecution.

RULE 136.

If the promovent in a libel or information neglects to proceed in the cause with the despatch the course of the court admits, the respondent or claimant may have the libel or information dismissed on motion, unless the delay is by order of the judge, or the act of the respondent or claimant.

RULE 137.

Four days' notice shall be given of the application to dismiss the action, and a copy of an affidavit or certificate of the clerk, that no proceedings had been taken, be served at the same time.

RULE 138.

A special session of the court (besides the sittings on Tuesday in each week) may be opened at any time *instanter*, on the allowance of the judge, for hearing and disposing of special motions, arguments or questions of law, and also for taking proofs, or hearing admiralty and maritime or revenue causes, and rendering interlocutory or final decrees therein.

RULE 139.

No party shall be compelled to take or meet proceedings at a special sessions, (without the order of the judge previously served on him,) in other than civil causes of admiralty and maritime jurisdiction.

RULE 140.

No special sessions will be held for the trial of jury causes, nor out of the city of New York, without a special order of the court, entered upon the minutes and published in a newspaper in the city of New York, and also in one nearest the place where the court is to be held, (if out of the city,) at least fifteen days previous to such sitting.

RULE 141.

A guardian *ad litem* will be appointed on a petition, verified by oath, stating a proper case for such appointment; and the guardian shall give stipulations for costs, &c., the same as if he was personally the party in interest.

RULE 142.

Infants may sue by *prochein ami*, to be first approved by the court; the *prochein ami* to give stipulations and be responsible for costs, in the same manner as the infant would be if of full age.

RULE 143.

Suits can only be prosecuted or defended *in forma pauperis* by express allowance of the court. In such case the pauper will be discharged of all stipulations or liabilities for costs.

RULE 144.

But the court, on satisfactory proof of the inability of a party to comply with the usual stipulations in a cause, may mitigate and modify such stipulations conformably to the equities or exigencies of the case.

RULE 145.

Where proceedings on a decree shall not be stayed by an appeal, and the decree shall not be fulfilled or satisfied in ten days after notice to the proctor of the party against whom it shall be rendered, it shall be of course to enter an order that the sureties of such party cause the engagement

of their stipulation to be performed, or show cause in four days, or on the first day of jurisdiction afterwards, why execution should not issue against them, their lands, goods and chattels, according to their stipulation; and if no cause be then shown, due service having been made on the proctor of the party, a summary decree shall be rendered against them on their stipulations, and execution issue; but the same may be discharged on the performance of the decree and payment of all costs.

RULE 146.

A party obtaining a decree of the court, may, at his election, have for the execution thereof like process as is now used in this state for like purposes, except that of personal attachment as for a contempt of court.

RULE 147.

The writ of *fieri facias* or *venditioni exponas* is adopted as final process in this court in all cases for the sale of property, and the proceedings thereon in admiralty cases shall be conformable to those on the common law side of the court.

RULE 148.

Whenever from the death of any of the parties, or changes of interest in the suit, defect in the pleadings or proceedings, or otherwise, new parties to the suit are necessary, the persons required to be made parties may be made such either by a petition on their part or by the adverse party.

RULE 149.

In either mode, it shall be sufficient to allege briefly the prayer of the original libel, the several proceedings in the cause and date thereof, and to pray that such persons required to be made parties to the suit may be made such parties.

RULE 150.

On service of a copy of such petition and of notice of the

presenting thereof, such order shall be made for the further proceeding in the cause as shall be proper for its speedy and convenient prosecution as to such new parties, and the same stipulations and security shall in all such cases be required and given, as in cases of persons becoming originally parties to a suit.

RULE 151.

A party shall not be held to enter his appeal from any decree or order of the court as final, unless the same is in a condition to be executed against him without further proceedings therein in court.

RULE 152.

Ten days from the time of rendering the decree shall be allowed to enter an appeal, within which time the decree shall not be executed. A brief notice in writing to the clerk and opposite proctor, that the party appeals in the cause, shall be a sufficient entry of the appeal, without any petition to the court for leave to enter the same.

RULE 153.

When an appeal shall be entered, the appellant shall, within ten days thereafter, give security for damages and costs; and if security shall not be given within that time, the decree may be executed as if there had been no appeal, unless further time be allowed by the court.

RULE 154.

The appellant shall give four days' notice to the adverse party, or his proctor, of the person or persons proposed as his sureties, with their additions and descriptions, and of the time and place of giving the stipulation.

RULE 155.

When an appeal shall be entered, the appellant shall cause the proceedings of the court, required by law to be

transmitted to the Circuit Court, to be transcribed for that purpose within thirty days after the appeal shall be entered in this court; and in default thereof, the decree shall be executed as if there had been no appeal, unless the court shall, upon special motion of the appellant, otherwise order.

RULE 156.

A re-hearing will not be granted in any matter in which a decree has been rendered, unless application is made at the term when the decree is pronounced, or there is a stay of proceedings by order of the judge.

RULE 157.

No libel of review will be entertained in cases subject to appeal, nor unless filed before the enrolment of the decree or return of final process issued in the cause.

RULE 158.

When any moneys shall come to the hands of the marshal under or by virtue of any order or process of the court, he shall forthwith pay over the gross amount thereof to the clerk, with a bill of his charges thereon, and a statement of the time of the receipt of the moneys by him, and upon the filing of such statements, and the taxation of such charges, the same shall be paid to the marshal out of such moneys; and the general account of all property sold under the order or decree of this court, shall be returned by the marshal, and filed in the clerk's office, with the execution or other process under which the sale was made.

RULE 159.

All bills of costs and of charges to be paid under any order or decree of this court, shall be taxed and filed with the clerk before payment thereof; and if the same shall include charges for disbursements other than to the officers of the court, the proper and genuine vouchers, or an affidavit therefor, (in cases of loss of vouchers,) shall be exhibited and

filed, and if such bill shall be taxed without four days' notice to all parties concerned, they shall be subject to a re-taxation, of course, on application by any such party not having had notice, and at the charge of the party obtaining such taxation.

RULE 160.

The clerk is authorized to tax or certify bills of costs and to sign judgments, and also take acknowledgments of the satisfaction of judgments and all affidavits and oaths out of court as in open court, in all cases where the same are not required by law to be taken in open court.

RULE 161.

In case of the absence of the clerk from the city, or his inability to transact business, his deputy or chief clerk is authorized to sign judgments, to tax or certify all bills of costs in this court, other than those of the clerk, and also to affix the seal of the court, and certify proceedings or papers in the name of the clerk in all other cases than exemplifications of the records or files of the court, and perform duties appertaining to the clerk by appointment of the court, or the course of practice, which are not specifically appointed by statute to be performed by the clerk.

RULE 162.

The clerk is authorized to enter satisfaction of record of any judgment rendered in this court in behalf of the United States, on filing acknowledgment of satisfaction of the same duly made by the District Attorney.

RULE 163.

All rules to which a party is entitled of course, or which are moved for upon the written consent of the parties, may be entered by the clerk in vacation, without the mandate of the judge, and be entitled as of a special court held on that day.

RULE 164.

Proctors of any Circuit or District Court of the United States, and attorneys of the Supreme Court of this State, and Solicitors of the Court of Chancery, may be admitted attorneys or proctors of this Court and counsellors of the said Supreme Court and Court of Chancery; and counsellors and advocates of such Circuit or District Courts may be admitted counsellors and advocates of this Court of course, upon taking the oaths prescribed by the constitution and laws of the United States.

RULE 165.

In admiralty and maritime causes wherein the matter in demand does not exceed fifty dollars, the proceedings for recovery thereof may be *summary*.

RULE 166.

Instead of filing a libel, the promovent in suits by individuals may, by short petition, state the matter of his demand and the amount or value thereof, or present an account stated, or a bill of charges by items, on filing either of which, process may issue as on the filing of a libel in ordinary cases.

RULE 167.

The same petition or statement used on application for a summons pursuant to the act of Congress of July 20, 1799, sec. 6, shall, when admiralty process is ordered by the judge or justice of the peace, be filed, and may stand and be proceeded upon in lieu of the libel in form.

RULE 168.

Any party intervening may contest the petition on demand orally or in writing, by general denial or affirmance, or file a plea in bar or answer or claim.

RULE 169.

No costs shall be taxed the defendant, for any plea, answer or claim, other than a general issue to the actor's demand, unless an answer on oath be demanded.

RULE 170.

Either party may file interrogatories to be propounded to his adversary, which shall be answered on oath.

RULE 171.

The monition or citation or attachment may be made returnable the first day of a stated or special session of court next succeeding the service thereof—at least three days intervening between the service and return of process *in rem*, in suits by individuals, and fourteen in suits by the United States; and on the return of process in open court duly served, the cause may be put *instanter* upon the calendar, and either party without other notice may proceed therein to proofs and hearing. And the party obtaining a continuance of the cause, if *in rem*, shall bear all expenses taxed for keeping the thing attached, intermediate such continuance and the final hearing.

RULE 172.

The notices to be published in suits by individuals, need contain only the title of the suit, the cause of action, the amount demanded, and the day and place of the return of the monition, and be subscribed with the name of the marshal and proctor of the libellant. No more than the usual printer's charge for advertisements of like size shall be taxed for the publication.

RULE 173.

In summary proceedings *in rem*, in behalf of the United States, when the goods are under seizure by the collector and in his possession, the clerk, at the instance of the district attorney, may omit the attachment clause in the monition issued.

RULE 174.

If the monition also contains an attachment in such cases, and the marshal returns that the goods, &c., are in the custody of the collector, he shall stand acquitted of all responsibility for their safe keeping or production to answer the decree.

RULE 175.

In such case the service of the motion shall be by leaving a copy or notice thereof, with the collector or person having the goods in keeping, and also making like service on the owner, or his agent, if known to the marshal, and resident in the city.

RULE 176.

The costs to be taxed the district attorney, proctor and advocate on either side in a summary cause, shall not exceed twelve dollars.

RULE 177.

Fees shall not be taxed for more than one witness to prove the same facts, unless it appears that the witness was impeached or his testimony contradicted. No charges for serving writs of subpœna shall be taxed against the opposite party when the writ is executed by the marshal. If a witness does not attend after regular summons, proceedings to attachment may be had against him, without the service of a writ of subpœna.

RULE 178.

The provisions of the twelve preceding rules are limited to those cases of admiralty and maritime jurisdiction in which no appeal lies from this court to the circuit court.

RULE 179.

Summary proceedings in all respects not specified in the preceding rules are to be governed by the general course of procedure of the court.

PRACTICE IN INFORMATIONS.

Rule 180.

Informations on seizures upon land and water are to be drawn in a plain and concise form, only referring to, without reciting, statutes or sections of statutes at large. The information should set forth the gravamen of the suit by plain and issuable allegations; and when *in rem*, the property demanded as forfeited is to be specified, together with the alleged cause of forfeiture. Informations are subject to the same general rules as to their structure and amendment as ordinary libels.

Rule 181.

Proceedings *in rem* for a forfeiture, and *in personam* for an offence, fine, penalty or debt, may be joined in one information, when having relation to the same transaction.

Rule 182.

On filing an information *in personam* or *in rem*, the clerk shall issue process thereon corresponding as nearly as may be with that employed in the instance court of admiralty in similar cases. But process *in personam* may be in the first instance a capias, or attachment against goods to compel an appearance, or a monition, at the election of the complainant.

Rule 183.

No party shall be held to bail on an information *in personam*, without the mandate of the judge, except where bail is required or authorized by statute.

Rule 184.

All rules applicable to the service of, or proceedings in relation to, process in plenary causes in admiralty, shall equally apply to process on informations.

RULE 185.

If the information filed is multifarious or ambiguous, or does not supply plain allegations upon which issue can be taken or a distinct reference to the statute upon which it is founded, the defendant or claimer may move the court to have it reformed, giving two days' previous notice, together with a specification of the exceptive parts, to the district attorney or proctor in whose name it is filed. It may be amended of course in conformity to such notice: if not reformed within two days after pronounced defective by the court, the defendant may take an order of discharge from the action.

RULE 186.

Amendments may be had to informations in any stage of the cause; but if after an issue is formed between the parties, it shall be on payment of all costs which may have accrued by means of the amendment or the defective pleading.

RULE 187.

In informations *in rem*, a delivery on stipulation of property seized, or a sale of perishable articles, may be had as in case of proceedings in the instance court of admiralty.

RULE 188.

The claimer shall appear and interpose his claim or plea on informations *in rem*, within the same time and in the same manner as in causes on the instance side of the court of admiralty; and shall appear and plead to informations *in personam* within the same time and in the same manner as in causes at common law: but no plea other than in abatement the general issue, former recovery, pardon or remission of the offence, fine or forfeiture, shall be received.

RULE 189.

Instead of a traverse of each separate cause of forfeiture alleged in the information, the defendant may plead as a

general issue to an information *in rem*, "that the several goods in the information mentioned did not, nor did any part thereof, become forfeited in manner and form as in the information in the behalf alleged."

RULE 190.

Putting in and justifying bail on behalf of the defendants on arrest, and the proceedings to and on trial and execution where a trial by jury must be had, shall be the same as in cases of common law jurisdiction.

ADDITIONAL RULES.

JUNE TERM, 1849.

To prevent unnecessary multiplication of suits, and the accumulation of costs for the recovery of seamen's wages, the following additional Rules in summary actions are adopted:

RULE 1.

In suits *in personam* for wages, where the amount sworn to be due in the libel is less than fifty dollars, the clerk shall not issue process without the usual stipulation for costs, unless the libel be accompanied by satisfactory proof that the respondent is about to leave the district; or by an allocatur of the Judge, or by a certificate of a Commissioner of the Court, that upon due service of a summons to the respondent to appear before him, sufficient cause of complaint whereon to found process appeared.

RULE 2.

Such summons shall be served at least one day previous to the day of hearing, therein mentioned, and if it shall appear on the hearing to the satisfaction of the Commissioner,

that the wages claimed have been paid or forfeited, he shall refuse the certificate. And if a reasonable offer of compromise shall be made on such hearing by either party, and be rejected by the other, the Commissioner shall add a certificate of such fact, and in case of final recovery by the party rejecting such offer, he shall recover no costs. No costs shall be taxed for the proceeding, unless the Commissioner shall certify that a demand of wages was made by the seaman a reasonable time previous to taking out the summons, and then the proctor shall be allowed no more than $1\frac{25}{100}$, the ordinary fees for attendance and motion in Court.

RULE 3.

No fees shall be taxed to the marshal, clerk or witness on such proceedings, unless by special mandate of the judge a subpœna or attachment is issued to compel the attendance of witnesses.

RULE 4.

The Commissioner's fees for his services thereon shall not exceed one dollar for a single sitting, and every adjournment granted shall be at the expense of the party obtaining it; if, however, it is required by the parties that the Commissioner take down in writing the testimony heard in the summons, he shall be allowed therefor the customary fees for like services. Proofs so taken in writing may be used by either party on the hearing in Court, in case the suit is further prosecuted.

RULE 5.

No more than one process shall issue against the master or owners at the same time for wages claimed by a crew, or any part thereof, for the same voyage, nor during the pendency of a suit therefor, nor shall costs be taxed for more than one retainer or libel, in such cases, unless an or-

der of the judge on cause shown, be previously had, authorizing other suits therefor. Seamen claiming wages for the same voyage may file an affidavit stating the amount due them, and if such affidavit be filed before the issue of process, the clerk may order the respondent to be held to bail in a sum exceeding by $100 the whole amount of such claims.

RULE 6.

The bail or stipulation given by the master or owner on such process shall be conditioned to abide the order of the Court in the particular suit, and in favor of such other parties as the Court may grant leave to join therein.

PRIZE RULES.

RULE 1.

There shall be issued, under the seal and authority of this court, commissions to such persons as the court shall think fit, appointing them severally commissioners to take examinations of witnesses in prize causes in *preparatory*, on the standing interrogatories, which have been settled and adopted by this court, and all other depositions which they are empowered to require, and to discharge such other duties in relation to ships or vessels, or property brought into this district as prize, as shall be designated by the said commissioners and the rules and orders of this court.

RULE 2.

The captors of any property brought into this district as prize, or some one on their behalf, shall without delay give notice to the district judge, or to one of the commissioners

aforesaid, of the arrival of the property, and of the place where the same may be found.

RULE 3.

Upon the receipt of notice thereof from the captors or district judge, a commissioner shall repair to the place where the said prize property then is; and if the same be a ship or vessel, or if the property be on board a ship or vessel, he shall cause the said ship or vessel to be safely moored in sufficient depth of water, or in soft ground.

RULE 4.

The commissioner shall, in case the prize be a ship or vessel, examine whether bulk has been broken; and if it be found that bulk has been broken, one of the said commissioners shall take information upon what occasion or what cause the same was done. If the property captured be not a ship or vessel, or in a ship or vessel, he shall examine the chests, packages, boxes or casks containing the subject captured, and shall ascertain whether the same has been opened, and shall in every case examine whether any of the property originally captured has been secreted or taken away subsequently to the capture.

RULE 5.

The commissioner in no case shall leave the captured property until he secure the same by seals upon the hatches, doors, chests, bales, boxes, casks, or packages, as the case may require, so that they cannot be opened without breaking the said seals; and the said seals shall not be broken, or the property removed, without the special order of the court, excepting in case of fire and tempest, or of absolute necessity.

RULE 6.

If the captured property be not a vessel, or on board a vessel, the commissioner shall take a detailed account of

the particulars thereof, and shall cause the same to be deposited, under the seals as aforesaid, in a place of safety, there to abide the order or decree of this court.

RULE 7.

If no notification shall, within reasonable time, be given by the captors, or by any person in their behalf, of any property which may be brought as prize within this district, and the commissioners, or either of them, shall become informed thereof, by any means, it shall be the duty of the said commissioners, or one of them, to repair to the place where such property is, and to proceed in respect to the same as if notice had been given by the captors.

RULE 8.

The captor shall deliver to the judge at the time of such notice, or to the commissioner or commissioners, when he or they shall, conformably to the foregoing rule, repair to the place where such captured property is, or at such other time as the said commissioners, or either of them, shall require the same, all such papers, passes, sea-briefs, charters, bills of lading, cockets, letters and other documents and writings as shall have been found on board the captured ship, or which have any reference to, or connection with, the captured property, and which are in the possession, custody, or power of the captors.

RULE 9.

The said papers, documents, and writings shall be regularly marked and numbered by a commissioner, and the captor, chief officer, or some other person who was present at the taking of the prize, and saw that such documents, papers and writings were found with the prize, must make a deposition before one of the said commissioners that they have delivered up the same to the judge or commissioner as they were found or received, without any fraud, subduction

or embezzlement. If any documents, papers or writings, relative to or connected with the captured property, are missing or wanting, the deponent shall, in his said deposition, account for the same according to the best of his knowledge, information and belief.

RULE 10.

The deponent must further swear, that if at any time thereafter, and before the final condemnation or acquittal of the said property, any further or other papers relating to the said captured property shall be found or discovered, to the knowledge of the deponent, they shall also be delivered up, or information thereof given to the commissioners, or to this court, which deposition shall be reduced to writing by the commissioner, and shall be transmitted to the clerk of the court, as hereinafter mentioned.

RULE 11.

When the said documents, papers and writings are delivered to a commissioner, he shall retain the same till after the examination *in preparatorio* shall have been made by him, as is hereafter provided, and then he shall transmit the same, with the same affidavit in relation thereto, the preparatory examinations, and the information he may have received in regard to the said captured property, under cover, and under his seal, to this court, addressed to the clerk thereof, and expressing on the said cover to what captured property the documents relate, or who claim to be the captors thereof, or from whom he received the information of the capture, which said cover shall not be opened without the order of the court.

RULE 12.

Within three days after the captured property shall have been brought within the jurisdiction of this court, the captor shall produce to one of the commissioners, three or four,

if so many there be, of the company or persons who were captured with, or who claim the said captured property, and in case the capture be a vessel, the master and mate or supercargo, if brought in, must always be two, in order that they may be examined by the commissioner *in preparatory*, upon the standing interrogatories.

Rule 13.

In the examination of witnesses *in preparatorio*, the commissioner shall use no other interrogatories but the standing interrogatories, unless special interrogatories are directed by the court. He shall write down the answer of every witness separately to each interrogatory, and not to several interrogatories together; and the parties may personally, or by their agents, attend the examination of witnesses before the commissioners; but they shall have no right to interfere with the examination, by putting questions, or objecting to questions; all objections to the regularity or legality of the proceedings of the commissioners must be made to the court.

Rule 14.

When a witness declares he cannot answer to any interrogatory, the commissioner shall admonish the witness, that by virtue of his oath taken to speak the truth, and nothing but the truth, he must answer to the best of his knowledge, or when he does not know absolutely, then to answer to the best of his belief concerning any one fact.

Rule 15.

The witnesses are to be examined separately, and not in presence of each other, and they may be kept from all communication with the parties, their agents or counsel, during the examination. The commissioners will see that every question is understood by the witness, and will take their exact, clear, and explicit answers thereto: and if any wit-

ness refuses to answer at all, or to answer fully, the examining commissioner is forthwith to certify the fact to the court.

RULE 16.

The captors must produce all their witnesses in succession, and cannot, after the commissioners have transmitted the examination of a part of the crew to the judge, be allowed to have others examined without the special order of the court; and the examination of every witness shall be begun, continued and finished in the same day, and not at different times. Copies of the standing interrogatories shall not be returned by the commissioner with the examination, but it shall be sufficient for the answer of the witnesses to refer to the standing interrogatories by corresponding numbers.

RULE 17.

Before any witness shall be examined on the standing interrogatories, the commissioner shall administer to him an oath in the following form: "You shall true answer make to all such questions as shall be asked of you on these interrogatories, and therein you shall speak the whole truth, and nothing but the truth, so help you God." If the witness is conscientiously averse to swearing, an affirmation to the same effect shall be administered to him.

RULE 18.

Whenever the ship's company, or any part thereof, of a captured vessel, are foreigners, or speak only a foreign language, the commissioner taking the examination may summon before him competent interpreters, and put to them an oath well and truly to interpret to the witness the oath administered to him, and the interrogations propounded, and well and truly to interpret to the commissioners the answers given by the witness to the respective interrogatories.

RULE 19.

The examination of each witness on the standing interrogatories shall be returned according to the following form:

"Depositions of A. B., a witness produced, sworn and examined *in preparatorio*, on the ——— day of ———, in the year ———, at the house of ———, on the standing interrogatories established by the District Court of the United States, for the southern district of New York. The said witness having been produced for the purpose of such examination by C. D., in behalf of the captors of a certain ship or vessel called the ———, (or of certain goods, wares and merchandise, as the case may be.)

"1st. To the first interrogatory, the deponent answers that he was born at ———, &c.

"2d. To the second interrogatory, the deponent answers that he was present at the time of the taking, &c."

RULE 20.

When the interrogatories have all been answered by a witness, he shall sign his deposition, and the commissioner shall put a certificate thereto in the usual form, and subscribe his name to the same.

RULE 21.

No person having or claiming any interest in the captured property, or having any interest in any ship having letters of marque or commissions of war, shall act as a commissioner. Nor shall a commissioner act either as proctor, advocate or counsel, either for captors or claimants in any prize cause whatever.

RULE 22.

If the captain or prize master neglect or refuse to give up and deliver to the commissioners the documents, papers and writings relating to the captured property, according to these rules; or refuse or neglect to produce, or cause to be produced,

witnesses to be examined *in preparatory*, within three days after the arrival of the captured property within the jurisdiction of this Court, or shall otherwise unnecessarily delay the production of the said documents, papers or writings, the commissioners, or one of them nearest to the place where the captured property may be, or before whom the examination *in preparatorio* may have been already begun, shall give notice in writing to the delinquent to forthwith produce the said documents, papers and writings, and to bring forward his witnesses, and if he shall neglect or delay so to do for the period of twenty-four hours thereafter, such commissioner shall certify the same to this Court, that such proceedings may therefor be had as justice may require.

RULE 23.

If within twenty-four hours after the arrival within this district, of any captured vessel, or of any property taken as prize, the captors or their agent shall not give notice to the judge or a commissioner, pursuant to the provisions herein made, or shall not, two days after such notice given, produce witnesses to be examined *in preparatorio*, then any person claiming the captured property and restoration thereof, may give notice to the judge or the commissioners as aforesaid, of the arrival of the said captured property, and thereupon such proceedings may be had by the commissioners in respect to the said property, and relative to the documents, papers and writings connected with the said capture, which the claimant may have in his possession, custody or power, and relative to the examination of witnesses *in preparatorio*, as near as may be, as is before provided for in cases where the captors shall give notice and examine *in preparatorio*. And the said claimant may, in such cases, file his libel for restitution, and proceed thereon according to the rules and practice of this Court.

RULE 24.

As soon as may be convenient after the captured property

shall have been brought within the jurisdiction of this court, a libel may be filed, and a monition shall thereupon be issued, and such proceedings shall be had as are usual in conformity to the practice of this court in cases of vessels, goods, wares and merchandise seized as forfeited in virtue of any revenue law of the United States.

RULE 25.

In all cases by consent of captor and claimant, or upon attestation exhibited upon the part of the claimant only, without consent of the captor, that the cargo or part thereof is perishing or perishable, the claimant specifying the quantity and quality of the cargo may have the same delivered to him on giving bail to answer the value thereof if condemned, and further to abide the event of the suit, such bail to be approved of by the captor, or otherwise the persons who give security, swearing themselves to be severally and truly worth the sum for which they give security. If the parties cannot agree upon the value of the cargo, a decree or commission of appraisement may issue from the court to ascertain the value.

RULE 26.

In cases where there is no claim, an affidavit being exhibited on the part of the captor of such perishing or perishable cargo, specifying the quantity and quality thereof, the captor may have a decree or commission of appraisement and sale of such cargo, the proceeds thereof to be brought into court, to abide the further orders of the court.

RULE 27.

The name of each cause shall be entered by the clerk upon the calendar for hearing in their order, according to the dates of the returns of the monitions, and lists of the causes ready for hearing are to be constantly hung up in the court room and clerk's office for public inspection.

RULE 28.

In all cases where a decree or commission of appraisement and sale of any ship and cargo, or either of them, shall have issued, no question respecting the adjudication of such ship and goods, or either of them, as to freight or expenses, shall be heard till the said decree or commission shall be returned, with the account of sales, and the proceeds according to such account of sales be paid into court, to abide the order of the court in respect thereto.

RULE 29.

After the examination taken *in preparatory* on the standing interrogations are brought into the clerk's office, and the monition has issued, no further or other examinations upon the said interrogatories shall be taken, or affidavits received, without the special directions of the judge, upon due notice given.

RULE 30.

None but the captors can, in the first instance, invoke papers from one captured vessel to another, nor can it be done without the special mandate of the judge; and in case of its allowance, only extracts from the papers are to be used.

RULE 31.

The invocation shall only be allowed on affidavit on the part of the captors, satisfying the court that such papers are material and necessary.

RULE 32.

Application for permission to invoke must be on service, at least two days previously, of notice thereof, and copy of the affidavit on the claimants or their agent, (if known to be in this port,) and after invocation allowed to the captors, the claimants, by permission of the judge, for sufficient

cause shown, may use other extracts of the same papers in explanation of the parts invoked.

RULE 33.

But when the same claimants intervene for different vessels, or for goods, wares or merchandise, captured on board different vessels, and proofs are taken in the respective causes, and the causes are on the dockets for trial at the same time, the captors may, on the hearing in court, invoke of course in either of such causes the proofs taken in any other of them; the claimants, after such invocation, having liberty to avail themselves also of the proofs in the cause invoked.

RULE 34.

In all motions for commissions and decrees of appraisement and sale, the time shall be specified within which it is prayed that the commissions or decrees shall be made returnable.

RULE 35.

The commissioners shall make regular returns on the days in which their commissions and decrees are returnable, stating the progress that has been made in the execution of the commission or decrees, and if necessary, praying an enlargement of the time for the completion of the business.

RULE 36.

The commissioners shall bring in the proceeds which have been collected at the time of their returns; and they may be required, from time to time, to make partial returns of such sums only as are necessary to cover expenses.

RULE 37.

On the returns of commissions or decrees, the commissioners or the marshal must bring in all the vouchers within their control.

RULE 38.

All moneys brought into court in prize causes, shall be forthwith paid into such Bank in the city of New York as shall be appointed for keeping the moneys of the court, and shall only be drawn out on the specific orders of the court in favor of the persons respectively having right thereto, or their agents or representatives duly authorized to receive the same.

RULE 39.

At every stated term of the court, the clerk shall exhibit to the court a statement of all the moneys paid into court in prize cases, designating the amount paid in each particular case, and at what time.

RULE 40.

The statement, when approved by the court, shall be filed of record in the clerk's office, and be open to the inspection of all parties interested, and certified copies thereof shall be furnished by the clerk, on request, to any party in interest, his proctor or advocate.

RULE 41.

When property, seized as prize of war, is delivered upon bail, a stipulation according to the course of the admiralty is to be taken for double its value.

RULE 42.

Every claim interposed must be by the parties in interest, if within convenient distance; or in their absence, by their agent or the principal officer of the captured ship, and must be accompanied by a test affidavit, stating briefly the facts respecting the claim and its verity, and how the deponent stands connected with or acquired knowledge of it. The same party who may intervene is also competent to attest to the affidavit.

RULE 43.

The captors of property brought in or held as prize, or which may have been carried into a foreign port, and there delivered upon bail by the captors, shall forthwith libel the same in fact, and sue out the proper process. The first process may, at the election of the party, be a warrant for the arrest of the property or person to compel a stipulation to abide the decree of the court, or a monition.

RULE 44.

The monitions shall be made returnable in twenty days, and if the property seized as prize is in port, shall be served in the same way as in the case of monitions issued on the instance side of the court of admiralty, on seizures for forfeiture under the revenue laws. In case the property claimed as prize is not in port, then the monition is to be served on the parties in interest, their agent or proctor, if known to reside in the district, otherwise by publication daily in one of the newspapers of this city for fifteen successive days preceding the return thereof.

RULE 45.

Whenever the jurisdiction of the court is invoked upon matters as incident to prize, except as to the distribution of prize money, there must be distinct articles or allegations in that behalf in the original libel or claim on the part of the party seeking relief. But in case the matters have arisen, or become known to the party subsequent to presenting his libel or claim, the court will allow him to file the necessary amendments.

RULE 46.

No permission will be granted to either party to introduce further proofs until after the hearing of the cause upon the proofs originally taken.

RULE 47.

In case of captures by the public armed vessels of the United States, and a proceeding for condemnation against the property seized as prize *jure belli*, or in the nature of a prize of war, under any act of Congress, the name of the officer under whose authority the capture was made must be inserted in the libel.

RULE 48.

A decree of contumacy may be had against any party not obeying the orders or process of the court, duly served upon him; and thereupon an attachment may be sued out against him. But no constructive service of a decree or process, *viis et modis*, or *publica citatio*, will be sufficient, unless there has been a publication thereof in a daily paper in this city, at least fifteen days immediately preceding the motion for an attachment.

RULE 49.

When damages are awarded by the court, the party entitled thereto may move for the appointment of three commissioners to assess the same; two persons approved by the court will thereupon be associated with the clerk or deputy clerk of this court, if not interested in the matter, whose duty it shall be to estimate and compute the damages in conformity to the principles of the decree, and return a specific report to the court of the amount of damages, and the particular items of which they are composed.

RULE 50.

Any party aggrieved may have such assessment of damages reviewed in a summary manner by the court before final decree rendered thereon, on giving two days' previous notice to the proctor of the party in whose favor the assessment is made, of the exceptions he intends taking, and

causing to be brought before the court the evidence given the commissioners in relation to the particular excepted to.

RULE 51.

Every appeal from the decrees of this court must be made within ten days from the time the decree appealed from is entered, otherwise the party entitled thereto may proceed to have it executed. No appeal shall stay the execution of a decree unless the party, at the time of entering the appeal, gives a stipulation, with two sureties, to be approved by the clerk, in the sum of two hundred and fifty dollars, to pay all costs and damages that may be awarded against him, and to prosecute the appeal to effect.

RULE 52.

If the party appealing is afterwards guilty of unreasonable delay in having the necessary transcripts and proceedings prepared for removing the cause, it will be competent to the other party to move the court for leave to execute the decree notwithstanding the appeal.

RULE 53.

In all cases of process *in rem* the property after arrest is deemed in the custody of the court, and the marshal cannot surrender it on bail, or otherwise, without the special order of the court.

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CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

ON APPEALS.

RULE 116.

An appeal can be taken from no other than final decrees.

RULE 117.

A decree shall be deemed final when in a state for execution without further action of the court below.

RULE 118.

Every appeal to the Circuit Court, in a cause of admiralty and maritime jurisdiction, shall be in writing, signed by the party, or his proctor, and delivered to the clerk of the District Court, from the decree of which the appeal shall be made: and it shall be returned to the court, with the necessary documents and proceedings, within twenty days, and by the first day of the term next after the delivery thereof to the clerk, unless a longer time is allowed by the judge.

RULE 119.

The appeal shall briefly state the prayers, or allegations, of the parties to the suit, in the District Court, in the proceedings in that court, and the decree, with the time of rendering the same. It shall also state whether it is intended, on the appeal, to make new allegations, to pray different

relief, or to seek a new decision on the facts, and the appellants shall be concluded in this behalf, by the appeal filed.

RULE 120.

A copy of the appeal shall, at the same time, be served on the proctor of the appellees, in the court below. And an affidavit, of the due service of such copy, shall be filed with the appeal. And no process, or order, shall be necessary to bring the appellees into this court.

RULE 121.

If in the appeal, it shall not be intended to make new allegations, to pray different relief, nor seek a new decision of the facts, then the pleadings, evidence, and decree, in the District Court, with the stipulations in the cause, and the clerk's account of the funds in court, in the cause, if any, shall be certified to this court with the appeal. But in all cases the statement of facts agreed between the parties, or settled by the judge of the District Court, and on file, according to the practice of that court, may be certified in the place of the evidence at large.

RULE 122.

If it shall be intended to seek only a new decision of the facts, then the pleadings of the parties, with the stipulations in the cause, and the clerk's account of the funds in court, if any, and the exhibits and depositions in the cause, shall be certified to this court with the appeal. But the proofs need not be certified, unless specially required by the appellant, or ordered by this court.

RULE 123.

If it shall be intended to make new allegations, or to seek new relief, then the return to the petition of appeal shall only contain copies of the process issued upon the libel, and of the return thereof, the account of the clerk of the funds

in court, in the cause, the depositions and exhibits, and the stipulations in the cause.

RULE 124.

The appellant shall cause the notice of appeal, and an affidavit of the service of a copy thereof, with the documents required to be returned with the appeal, to be filed in this court within four days after the return is completed by the clerk, otherwise the appeal shall not be received, and shall be deemed deserted; and a certificate in this behalf shall be made to the court from which the appeal is made, which may proceed to execution of its decree.

RULE 125.

This court shall be deemed possessed of the cause, from the time of filing the appeal, with the documents required to be returned therewith, in this court.

RULE 126.

If the appellee does not enter his appearance, within the two first days in term, succeeding the filing the appeal, and proceedings, and affidavit of service of notice thereof on him, the appellant may proceed *ex parte* in the cause, and have such decree as the nature of the case may demand.

RULE 127.

No answer, or issue, need be given to the appeal. Each party may notice the cause for hearing, for the term to which the appeal is made (if made in term time), or if made in vacation, for the term next succeeding.

RULE 128.

A writ of *inhibition* will be awarded, at the instance of the appellant, when circumstances require, to stay proceedings in the court below; notice of such application having been previously given.

RULE 129.

A *mandamus* may in like manner be obtained to compel a return of the appeal when unreasonably delayed by the clerk, or court below.

RULE 130.

If the appellee shall have any cause to show why new allegations, or proofs, should not be offered, or new relief prayed, on the appeal, he shall give four days' notice thereof, and serve a copy of the affidavit containing the cause intended to be shown: and such cause shall be shown within the two first days of the term; otherwise the appeal shall be allowed according to its terms.

RULE 131.

If new allegations are to be made, or different relief prayed, in this court, then the libellant in the District Court shall exhibit, in this court, a libel, on oath within ten days, to which the adverse party shall, in twenty days, answer on oath, subject in each case to the extension of those periods, by order of either of the judges of this court; and on a default on this behalf, the court will, on motion, without notice, make such order for finally disposing of the cause, on the default of the party, as the nature of the case may require.

RULE 132.

After the libel and answer, whether newly filed in this court, or certified from the District Court, shall be filed in this court, the cause shall be proceeded in to a hearing, as in other cases. But where interrogatories have been answered in the District Court, or written testimony taken, the same may be used in this court.

RULE 133.

The appellee may move this court to have the decree made in the District Court carried into effect, subject to the judgment of this court, or of the Supreme Court on appeal,

upon giving his own stipulation to abide and perform the decree of such courts: and this court will make such order, unless the appellant shall give security by the stipulation of himself, and competent sureties, for payment of all damages and costs, on the appeal in this court, and in the Supreme Court, in such sums as this court shall direct.

RULE 134.

In cases where an appeal shall lie from the decree of this court, the final decree shall not be executed until ten days shall have elapsed from the pronouncing or filing of the decision of the court.

RULE 135.

When appeal shall be made from the decree of this court, the appellant shall, within four days from the pronouncing or filing of such decision, unless further time is allowed by the judge, make, and serve on the adverse party, a statement of the testimony on the trial, excepting such evidence as was in writing, which shall be properly referred to therein. The party on whom the same shall be served shall, in four days after such service, propose amendments thereto, or the statement shall be deemed acquiesced in, and the statement and amendments, unless acquiesced in, shall be submitted by the appellant to the judge, in four days afterwards, for settlement; and the same, when settled, shall be engrossed by the clerk, and with the written evidence, shall be deemed the proofs on which the decree is made, and shall operate as a stay of further proceedings in this court.

RULE 136.

In all cases, in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing Rules of this Court, the Rules of Practice of the District Court for the Southern District of New York, being in force

at the time, and whether established before or after these Rules, (not being inconsistent with these Rules,) are adopted, and are to be received as Rules of Practice in this Court.

CIRCUIT COURT.

NORTHERN DISTRICT OF NEW YORK.

Rules of the Circuit Court of the United States for the Northern District of New York, regulating appeals from the District Court.—June Term, 1848.

I.

The transcript to be sent to this court, on appeal thereto from a sentence or decree of the District Court, may be certified by the clerk of the latter court, under his hand and the seal of the Court.

II.

Eight days' notice of hearing on appeal shall in all cases be given, by the service thereof on the adverse party, or on his proctor.

III.

When an appeal from a decree of the District Court is interposed twenty days before the next stated session of this court, it may be noticed for hearing at such session by either party.

IV.

When an appeal from a decree of the District Court is interposed less than twenty days before the next stated ses-

sion of this court, the appellee may, at his option, notice the cause for hearing at such session, on the first or other day thereof; or have the cause continued until the next stated session.

V.

Transcripts of the depositions taken in any cause, in the District Court, according to law—whether *de bene esse* under the acts of Congress, or on commission—and read at the hearing of the cause in that court, may be transmitted to this court on appeal, and read by either party as evidence at the hearing of the cause in this court.

VI.

A copy of the notes taken by the judge, or under his direction by the clerk, of the District Court, of the evidence of witnesses examined orally therein, shall be certified and transmitted to this court on appeal, along with the transcript of the record and other proceedings in the cause, and shall be admitted to prove the evidence given by such witnesses; but nothing herein contained shall be construed to abridge the right of the parties to re-examine such witnesses in this court, if they shall see fit to do so.

DISTRICT COURT.

NORTHERN DISTRICT OF NEW YORK.

Rules of Practice of the District Court of the United States for the Northern District of New York, in causes arising under the Act of Congress, entitled "An Act extending the Jurisdiction of the District Courts to certain cases upon the Lakes and navigable waters connecting the same," passed February 26, 1845, *and in causes of Admiralty and Maritime Jurisdiction other than those of municipal seizure.—July Term,* 1848.

1.

The "Rules of Practice of the Courts of the United States, in causes of Admiralty and Maritime jurisdiction, on the instance side of the court," prescribed by the Supreme Court of the United States, at the January Term, 1845, are understood to be obligatory on this court, in all causes arising under the act of Congress, entitled "An Act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same," passed February 26th, 1845; and the said Rules are hereby declared to be Rules of Practice in this court, in exercising the jurisdiction conferred by the said act.

2.

A special session of the court will be held at Auburn on the first Tuesday of every week, at ten o'clock in the fore-

noon; at which special sessions all process must be made returnable, and all proceedings must be had, except trials by jury, which will not be held without a special order of the judge for that purpose, except at a stated term. And in case of the non-attendance of the judge at the time hereby appointed, or at any other time which may by special order be appointed, for any special session of the court, all process and proceedings shall be continued, without prejudice, to the next special session, or to some earlier day for that purpose appointed by the judge.

3.

All process shall bear test of the day on which it is sealed, and shall be made returnable before the judge at Auburn, on Tuesday of the week next after the test thereof, or of some succeeding week.

4.

The newspaper called the *Buffalo Commercial Advertiser*, printed at the city of Buffalo, is hereby designated, in pursuance of Rule IX. of the Rules of Practice in admiralty and maritime causes prescribed by the Supreme Court, as the newspaper in which all notices shall be printed, which are by the said rule required to be published in a newspaper, in all suits *in rem*, in which the arrest of the vessel, goods, or other thing proceeded against, has been made at or within the collection district of Buffalo Creek.

5.

The Cayuga County Bank, in the village of Auburn, is hereby designated, in pursuance of Rule XLII. of the same Rules, as the place of deposit for moneys paid into court.

6.

Libels, answers, and all other pleadings and papers to be filed, shall be so plainly written as to be readily legible, and shall be free, to all reasonable extent, from interlineations

and erasures; and it shall be the duty of the clerk to reject all papers delivered to him to be filed, which are not in conformity with this rule.

7.

All libels praying process of arrest, whether *in rem* or *in personam*, shall be verified by the oath or solemn affirmation of the libellant, unless, for sufficient cause shown, such oath or affirmation shall be dispensed with by the special order of the judge. And all libels, answers and other pleadings shall be signed by the party in his own proper handwriting, and in like manner by the proctor for the party in whose behalf they are filed, unless, for special cause shown, such signature shall be dispensed with by leave of the court.

8.

In suits *in rem*, the mesne process shall be served, and the required notices given, at least fourteen days before the return day of the process, unless a shorter time shall be prescribed by special order, founded upon the exigencies of the particular case.

9.

All process, and all notices for publication in a newspaper, in pursuance of Rule IX. of the Rules of Practice in admiralty and maritime causes, prescribed by the Supreme Court, shall be drawn up by the clerk; and no process, except subpœnas, shall be issued by him in blank.

10.

The notice mentioned in the last preceding rule shall contain the title of the suit, a summary statement of the cause of action, the amount claimed by the libellant, and the day and place fixed for the return of the process; and shall have the name of the proctor of the libellant, and that of the marshal, or of his deputy, by whom the arrest shall have been made, suffixed thereto.

11.

The amount of the debt or damages for which the action is brought shall be stated in the libel, and, with the addition thereto, for costs, of $250, in a suit *in rem*, and of $100 in a suit *in personam*, shall be endorsed on the mesne process, thus: "Action for $."

12.

When the libellant is not a resident of the district, he shall, at the time of commencing his suit, give a bond or stipulation, with one or more sufficient sureties, in the sum of at least one hundred dollars, if the suit is *in personam*; and in the sum of at least two hundred and fifty dollars, if the suit be *in rem*—conditioned that he will appear from time to time, and abide by all orders, interlocutory and final, of the court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of this court, or of any appellate court: *Provided*, however, that this regulation shall not extend to suits for seamen's wages, nor to suits for salvage when the salvors have come into port in possession of the property libelled.

13.

In all cases not embraced within the last preceding rule, on motion of the defendant or claimant, the court will, in its discretion, direct the libellant, on pain of dismissing his libel, to give the like security.

14.

Instead of the security specified in the two last preceding rules, the party from whom it is required may, at his option, deposit in court a sum of money of the like amount.

15.

If in any case a libel shall be filed in behalf of a libellant who is not a resident within the district, before security for

costs and expenses shall be filed as required by Rule XII., the proctor for such libellant shall be liable for such costs and expenses to the amount specified in the said rule, until such security shall be filed; and the payment thereof may be enforced by summary process *in personam* against such proctor.

16.

When a proctor is retained to defend in any suit, before the return day of the mesne process therein, who resides or has his place of business more than three miles from the clerk's office, and not more than three miles from the residence or place of business of the proctor for the libellant, such proctor for the defendant may, at any time before the return day of the process, serve a notice of his retainer on the proctor for the libellant; and it shall thereupon be the duty of the proctor for the libellant, without delay, to serve on the proctor for the defendant a copy of the libel on file.

17.

When the defendant's answer, or any other pleading subsequent to the libel, is put in by being simply filed in the clerk's office, instead of being given in open court, in presence of the proctor or advocate for the adverse party, a copy thereof, with notice of the time of filing the same, shall without delay be served on the proctor of such adverse party.

18.

When a decree is made in the absence of the proctor of either party to the suit, unless such proctor resides at the place where the clerk's office is kept, it shall be the duty of the clerk immediately to transmit to him by mail a copy of the decree; and such proctor and party shall be responsible to the clerk for the fees to which he may be entitled for such service, according to the usual rate of charge.

19.

Not less than six days' notice shall be given of the sale of property on final process; and when, in the opinion of the marshal or his deputy, by whom the sale is to be made, the circumstances of the case require a longer notice, he may, in his discretion, extend it to any time not exceeding twenty days.

20.

For the custody of vessels and other property while under arrest, the marshal shall be entitled to the same fees as are allowed by the 92d rule of this court in cases of municipal seizure; subject, however, to alteration by the court in particular cases for special cause shown.

21.

When interrogatories are propounded by the defendant at the close of his answer, touching any matters charged in the libel, or touching any matter of defence set up in the answer, (according to Rule XXXII. of the Rules of Practice prescribed by the Supreme Court,) the libellant shall answer the same within twelve days, unless, for sufficient cause shown, he shall, by special order, be allowed a longer period; and the court may, in its discretion, require such interrogatories to be answered within a shorter time, or *instanter*.

22.

When interrogatories are propounded to a garnishee (in pursuance of Rule XXXVII. of the Rules of Practice prescribed by the Supreme Court,) a copy thereof shall be served upon the garnishee personally, or, in case of his absence from his dwelling house or usual place of abode, by leaving such copy with some person of suitable age who is a member or resident of the family; and the garnishee shall be required to answer the interrogatories within twelve days after such service, unless a longer period shall, for adequate cause

shown, be by special order allowed for that purpose; and the court may also, in its discretion, prescribe a shorter period.

23.

Exceptions to the libel (taken in pursuance of Rule XXXVI. of the Rules of Practice prescribed by the Supreme Court,) for surplusage, irrelevancy, impertinence or scandal, may be taken *ore tenus*, on the return day of the mesne process; and exceptions to the answer or other allegation given by the defendant, taken for the like causes, in pursuance of the same rule, or in pursuance of Rule XXVII., for want of sufficiency, fulness or distinctness, may be taken in like manner, when the answer or allegation is put in in open court; and the court will thereupon, in its discretion, either decide upon the sufficiency of the exceptions so taken, *instanter*, or direct the same to be drawn up in writing, and appoint a day to hear argument thereon, or refer the same to a commissioner.

24.

When, at the return of the mesne process, further time has been granted to answer the libel; and the answer, instead of being produced and offered in open court, in the presence and hearing of the advocate of the libellant, is simply filed with the clerk, a copy thereof shall, without delay, be served on the proctor for the libellant, personally, if he resides within three miles of the proctor for the defendant, otherwise either personally or by mail; and the proctor for the libellant may, within ten days after the service thereof, file and serve exceptions thereto. The defendant, within eight days after the service of such exceptions, may give a written notice of his submission to any or all of them; and if any of them are not submitted to within the time prescribed, the libellant may bring the same to a hearing before the court, by giving, at any time within six days, a notice of not less than six nor more than ten days, of such

at the time, and whether established before or after these Rules, (not being inconsistent with these Rules,) are adopted, and are to be received as Rules of Practice in this Court.

CIRCUIT COURT.

NORTHERN DISTRICT OF NEW YORK.

Rules of the Circuit Court of the United States for the Northern District of New York, regulating appeals from the District Court.—June Term, 1848.

I.

The transcript to be sent to this court, on appeal thereto from a sentence or decree of the District Court, may be certified by the clerk of the latter court, under his hand and the seal of the Court.

II.

Eight days' notice of hearing on appeal shall in all cases be given, by the service thereof on the adverse party, or on his proctor.

III.

When an appeal from a decree of the District Court is interposed twenty days before the next stated session of this court, it may be noticed for hearing at such session by either party.

IV.

When an appeal from a decree of the District Court is interposed less than twenty days before the next stated ses-

Brief on final argument in court upon the merits $2 50
[These briefs to include all abbreviations of pleadings, proofs, &c., and no separate allowances made therefor.]
Attending judge or commissioner on taking testimony *de bene esse* out of court, (if not the advocate,) 5 00
Attending clerk or assessors on reference and computation of damages, (if not the advocate,) 3 00
[But no more than one attendance taxed in either of the two last cases.]
Attending taxation of costs, when notice thereof has been given or received 50
Copy of bill of costs for opposite party 37½
Every necessary notice actually given 37½
Arguing a motion or cause in court, (if not the advocate, and if the charge is not taxed for an advocate in the cause) 1 25

FEES OF ADVOCATES AND PROCTORS ON PROCEEDINGS TO OBTAIN ORDER FOR PROCESS FOR SEAMEN'S WAGES IN PLENARY CASES.

Drawing affidavit and ac. per folio of 100 words 25
Copy ..... " " 12½
Attendance before Judge 62½
Summons for Judge, per fol 25
For copies, per folio 12½
Motion for process 62½
Arguing motion when opposed 1 25
Copy costs for opposite party 37½
Attendance on taxation 50
Witnesses' fees per day 1 25
Drawing affidavit of serving summons, per folio 25
Copy, per folio 12½
And disbursements actually made.
If before a U. S. Commissioner, or State officer, his fees are to be added.

PART II.

PRACTICAL FORMS.

A.

LIBELS OF INFORMATION FOR FORFEITURES, WITH CLAIMS AND ANSWERS AND OTHER PROCEEDINGS CONSEQUENT THEREON.

No. 1.

Libel of Information against goods, in four Counts; 1st Count, alleging that they were unladen without a permit, contrary to the Stat. 1799, *Cap.* 128, [128,] § 50; *2d Count, alleging that they were found concealed, contrary to the same Stat.* § 68; *3d Count, alleging that, being of foreign growth or manufacture, they were landed and unladen at some place other than one directed by any Statute of the United States, contrary to the same Stat.* § 91; *4th Count, alleging that they were imported into the United States in some district on the northern or northwestern boundary, &c., and were afterwards unladen without a permit, contrary to the same Stat.* §§ 50, 105; *with a Claim, an Admission of the Claim, Answer, and Replication.*

[The editor is indebted for this valuable precedent to a source, the authority of which, if he were allowed to name it, would be unquestioned.]

Libel of Information.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

District Court, ——— Term, 18—.

To the Hon. JOHN DAVIS, *Judge of the District Court of the United States for the District aforesaid.*

BE IT REMEMBERED, That on this —— day of ——, in the year of our Lord eighteen hundred and ———, before the Hon. JOHN DAVIS, Judge as aforesaid, comes in his own proper person, ———, Esquire, Attorney of the United States, for the aforesaid District of Massachusetts, and in the name and behalf, as well of the United States as of ———, Esquire, Collector of the Port of ———, in said District, and of all other persons concerned, propounds and gives the said Judge to understand and be informed, that on the ——— day of ———, in the year aforesaid, at ———, in the District of Massachusetts aforesaid, and "on waters which were navigable from the sea by vessels of ten or more tons' burthen,"[1] the said ———, Collector as aforesaid, did seize the following goods, wares, and merchandise, to wit:

[Here insert the goods seized.]

and now hath the same in his custody as being forfeited for the causes hereinafter mentioned, to wit:

1. For that the said goods, wares, and merchandise, after the thirtieth of June, in the year of our Lord one thousand seven hundred and ninety-nine, and before the seizure thereof as aforesaid, were brought into some port or place of

[1] If the seizure be on land, it must of course be so stated. The proceedings, however, will then take place on the *Exchequer* side and not the *Admiralty* side of the Court, and the complaint will be by *Information* and not by *Libel of Information*. The one is a proceeding at common law, which may terminate in questions for the jury; the other is a proceeding, which is founded on the practice of the civil law, and in which all the questions are referred to the Court.—EDITOR.

some district of the United States to the said Attorney as yet unknown, in some ship or vessel to the said Attorney as yet unknown, from some foreign port or place to the said Attorney as yet unknown; and the said goods, wares, and merchandise, being so brought as aforesaid, afterwards, between the ———, day of ——— and the seizure aforesaid, were unladen and delivered from the said ship or vessel within the United States, to wit, in some port or place of the district aforesaid, without a permit or special license from the Collector, or naval officer, or any other competent officer of the customs of the port or district, where the same were so unladen and delivered, for such unlading or delivery, against the form of the statute in such case made and provided.[1]

2. And also for that the said goods, wares, and merchandise, being subject to duties by the Statutes of the United States, were, after the thirtieth day of June, in the year of our Lord one thousand seven hundred and ninety-nine, and before the seizure aforesaid, brought into the United States; and, being so brought as aforesaid, afterwards, to wit, on the day of the seizure aforesaid, were found concealed in a certain ——— at ———, in the district aforesaid, the duties on said goods, wares, and merchandises not having been before that time paid or secured to be paid, against the form of the statute in such case made and provided.[2]

3. And also for that the said goods, wares, and merchandise, being of foreign growth or manufacture, and subject to the payment of duties by and under the Statutes of the United States, were, after the thirtieth day of June, in the year of our Lord one thousand seven hundred and ninety-nine, brought into some district of the United States to the said Attorney as yet unknown, being other than a district on the northern, northwestern, or western boundaries of the

[1] Stat. 1799, Chap. 128, [128,] § 50. [2] Ibid, § 68.

United States, adjoining to the dominions of Great Britain in Upper and Lower Canada, and a district on the rivers Ohio and Mississippi, from some foreign port or place to the said Attorney as yet unknown; and being so brought as aforesaid, were afterwards, between the —— day of ——, in the year of our Lord one thousand eight hundred ——, and the seizure aforesaid, landed and unladen at some port or place within the United States, to the said Attorney as yet unknown, being other than a port or place directed by any Statute of the United States for such landing and unlading, against the form of the statute in such case made and provided.[1]

4. And also for that the said goods, wares, and merchandise, being subject to duties on being imported into the United States, were, after the thirtieth day of June, in the year of our Lord one thousand seven hundred and ninety-nine, and before the seizure aforesaid, imported into some district of the United States to the said Attorney as yet unknown, being a district on the northern or northwestern boundaries of the United States, or on the rivers Ohio and Mississippi, in some vessel, boat, raft, or carriage to the said Attorney as yet unknown; and the said goods, wares, and merchandise, being so imported as aforesaid, were afterwards, between the ——— day of ———, in the year of our Lord one thousand eight hundred and ——, and the seizure aforesaid, unladen and delivered from such vessel, boat, raft, or carriage within the United States, to wit, in some port or place in the district aforesaid, without any permit or special license from the Collector or naval officer, or any other competent officer of the customs of the port or district where the same were unladen and delivered, for such unlading or delivery, against the form of the Statute in such case made and provided.[2]

By reason of all which, the premises, and the Statutes in

[1] Stat. 1799, Chap. 128, [128,] § 92. [2] Ibid, § 50 and § 105.

this behalf made and provided, the said goods, wares, and merchandise have become and are forfeited to the uses in said Statutes specified. Wherefore the said Attorney prays the advisement of the said Judge in the premises, and for a monition or other proper process, to the end that the same goods, wares, and merchandise may be decreed to be and remain forfeited, and the proceeds after condemnation be distributed according to the provisions of the Statutes aforesaid.

A B,
Attorney of the United States for the District of Massachusetts.

Claim.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

District Court, ——— Term, 18—.

United States v. ——— ———.

And ——— ———, of ———, in the County of ———, and State of ———, comes and claims as his own property certain goods, wares, and merchandise seized by the said ——— and libelled and propounded against as forfeited in and by the libel of information aforesaid, to wit, ——— ———; and the said ——— alleges, that at the time of the seizure aforesaid he was and yet is the true, sole, and lawful owner and proprietor *bonâ fide* of the said goods, wares, and merchandise; and of this he is ready to make due proofs by his own oath and otherwise, as the said Court shall direct.

C D (the Claimant.)

E F, *Proctor.*

Sworn to by the Claimant,[1]

G H, *Clerk.*

[1] An agent who makes a claim will swear according to his knowledge and belief.—EDITOR.

Admission of the Claim.

[And thereupon the said ——— is admitted to claim the said goods, wares, and merchandise.]

Answer.

And the Libel of Information aforesaid having been read, heard, and fully understood by him, the said Claimant, he says, that by color of the seizure aforesaid he is unjustly and grievously vexed; nevertheless for plea and answer to the several counts and allegations in the said Libel of Information contained, and in order to entitle himself to a restitution on the said goods, wares, and merchandise so claimed by him as aforesaid, he propounds and alleges as follows.

First. As to the first count and allegation, he says, that by reason of any matter therein contained, the said goods, wares and merchandise ought not to be decreed to be and remain forfeited; because he says, that the said goods, wares, and merchandise were not unladen and delivered from any ship or vessel within the United States, without a permit or special license for such unlading and delivery in manner and in form as in the same count and allegation is alleged; and of this he is ready to make due proof, as the Court shall direct.

Second. And as to the second count and allegation, he says, that, by reason of any matter therein contained, the goods, wares and merchandise ought not to be decreed to be and remain forfeited; because he says, that the duties on said goods, wares, and merchandise were, long before the time of the seizure aforesaid, paid or secured to be paid, to wit, on ———, at the office of the Collector of the Customs within and for the District of ———; and of this he is ready to make due proof, as the Court shall direct.

Third. And as to the third count and allegation, he says, that, by reason of any matter therein contained, the said goods, wares, and merchandise ought not to be decreed to be and remain forfeited; because he says, that the said goods, wares, and merchandise were not landed or unladen at a port or place within the United States, other than a port or place directed by any Statute of the United States for such landing and unlading, in manner and form as in the same count and allegation is alleged; and of this he is ready to make due proof, as the Court shall direct.

Fourth. And as to the fourth count and allegation, he says, that, by reason of any matter therein contained, the said goods, wares, and merchandise ought not to be decreed to be and remain forfeited; because he says, that the said goods, wares, and merchandise were not unladen and delivered from any ship, vessel, raft, or carriage within the United States without a permit or special license for such unlading and delivery, in manner and form as in the same count and allegation is alleged; and of this he is ready to make due proof, as the Court shall direct.

Wherefore he prays, that the said goods, wares, and merchandises may be decreed to be restored to him, and that he may hence be dismissed with his reasonable damages and costs occasioned by the premises.[1]

E. F., *Proctor.*

Replication.

And said Attorney of the United States, by way of repli-

[1] The United States never pay costs. See *United States* v. *Hooe*, 3 Cranch R. 92; *United States* v. *Parker*, 2 Wheat. R. 395; *United States* v. *La Vengeance*, 3 Dall. R. 301. Yet, in an answer to a *Libel of Information*, it is deemed advisable to pray for costs and damages, in order to lay a foundation for claiming them in the event of an action against the collector for a seizure without justifiable cause.—Editor.

cation to said plea and answer of said ———, doth aver that the matters in the said plea and answer are not true in fact and sufficient in law to bar the forfeiture aforesaid, and that the matters contained in his said Libel of Information are true in fact and sufficient in law to maintain a decree of forfeiture according to the prayer thereof, of all which matters he is ready to make due proof, as the Court shall direct.

A B,
Attorney of the United States for the District of Massachusetts.

No. 2.

Libel of Information against a ship on account of her being falsely registered, founded on Stat. 1792, *Chap.* 45, [1,] § 4.

Libel of Information.

[This precedent is taken from Hall's Admiralty Practice, pp. 184–189.]

UNITED STATES OF AMERICA, MARYLAND DISTRICT, SS.

To the Honorable JAMES WINCHESTER, *Judge of the District Court of the United States for the Maryland District.*

IN the name and on the behalf of the United States of America, Zebulon Hollingsworth, Attorney of the United States for Maryland District, cometh into Court here in his proper person, and giveth the Court here to understand and be informed, that heretofore, to wit, on the 25th day of November, 1801, at the Port of Baltimore, in Maryland District, a certain Aquilla Brown, a citizen of the United States of America, and of the City of Baltimore, being a part owner of a certain ship called *The Anthony Mangin*, appeared

before Robert Purviance, Collector of the Customs of the United States of America, at the Port of Baltimore, in Maryland District, he, the said Robert Purviance, being then and there the officer authorized by law to make registry of the said ship; and the said Aquilla Brown then and there, to wit, on the day and year aforesaid, at the District aforesaid, made oath before the said Robert Purviance, on the Holy Evangels of Almighty God, that he, the said Aquilla Brown, was the sole owner of the said ship, called *The Anthony Mangin*, the said oath being then and there made by the said Aquilla Brown, and so as aforesaid administered by the said Robert Purviance, Collector as aforesaid, in order to the registry of the said ship, and with the intent to obtain, and for the purpose of obtaining, a register for the said ship, pursuant to the Statute of the United States in such case made and provided. And the said Attorney, in the name and on behalf of the said United States, doth aver, and in fact say, that the said fact in the said oath alleged, that the said Aquilla Brown was the sole owner of the said ship, called *The Anthony Mangin*, within the knowledge of the said Aquilla Brown so swearing as aforesaid, was not true, to wit, on the day and year aforesaid, at the District aforesaid; but the said Attorney, in the name and on the behalf of the said United States, doth in fact aver and say, that the said fact, so alleged in the said oath, was false and untrue, and that, within the knowledge of the said Aquilla Brown, a certain Herman Henry Hackeman, an alien, and not a citizen of the United States of America, was part owner of the said ship, called *The Anthony Mangin*, at the time of making the said oath by the said Aquilla Brown as aforesaid, with the intent and for the purpose aforesaid, and in order to the registry of the said ship, to wit, on the day and year aforesaid, at the District aforesaid, for which causes the said Robert Purviance, Collector as aforesaid, hath seized the said ship, her tackle, apparel, and furniture, as by law

forfeited.—Wherefore the said Attorney prayeth the advice of the Court here in the premises, and that due process of law may issue against the said ship, her tackle, apparel, and furniture, and that due proclamation with monition may issue in this behalf to cite and admonish all persons to be and appear at a day and place, by your Honor to be named, to show cause, if any they have, why the said ship, called *The Anthony Mangin*, her tackle, apparel, and furniture, should not be condemned and sold, and the money arising from said sale be distributed according to law; and that she be so condemned and sold, and the money so distributed, *prayeth.*

ZEB. HOLLINGSWORTH,
Attorney for the U. S. for Maryland District.

Claim and Answer.

AND now comes here Thomas W. Norman by Luther Martin, his Proctor, and claims the said ship, her tackle, apparel, and furniture, and for his claim and answer unto the said Libel, he saith, that the said ship was originally built in the State of Virginia, and that when she was completely fitted for sea she was registered as the sole property of the said Brown, and that the sea-letter obtained for the said ship on her first voyage was obtained for her as the sole property of the said Brown. This claimant further saith, that on the voyage, which the said ship first made, was to England and back to Baltimore, and which was the only voyage performed by her while she was owned by said Brown, this Claimant was master of said ship, and that a considerable part of her cargo was on freight, and that the whole of the said freight was, in England, applied to the use of the said Brown alone, and that on the return of the said ship to the Port of Baltimore, this Claimant still continuing

master thereof, the freight which became due on the return voyage was received by the assignees of the said Brown, he having in the intermediate time been declared a bankrupt, and by them applied to the use of the creditors of the said Brown. This Claimant further answering saith, that upon the return of the said ship to the said Port of Baltimore, she was taken into the possession of the said assignees, as having been the property of the said Brown, and was there publicly advertised in the newspapers of that city for sale, as the property of the said Brown, and was so sold as such in the City of Baltimore at public auction, and, as this Claimant believes, with the privity and knowledge of the said Robert Purviance, and the other officers of the customs for the Port of Baltimore, and that, at the said sale, the said ship, &c. was purchased by one Michael Saunderson, a citizen of the United States, he being the highest bidder, to whom a register was duly granted by the said Robert Purviance, Collector as aforesaid at the Port of Baltimore. This Claimant further answering saith, that, while the said Michael Saunderson was owner of the said ship, she made a voyage to England and returned again to the Port of Baltimore, and that upon the return of the said ship to the Port of Baltimore this Claimant purchased the said ship from the said Michael Saunderson, and duly obtained a register for the said ship from the said Robert Purviance, Collector as aforesaid at the Port of Baltimore aforesaid, and that the said Robert Purviance, and the other officers of the customs at the said Port, when the register was granted to the said Michael Saunderson, and also when the register was granted to this Claimant, well knew that the said ship was the same for which the said Brown had obtained a register as aforesaid. This Claimant further answering saith, that, after he had thus obtained a register for the said ship, he prosecuted one voyage with her to England, and from thence to the Port of Baltimore, immediately after her arrival at which Port she was seized

as aforesaid; and that he doth not know, believe, or admit, that the said ship was part owned by the said Hackeman or any other person, except the said Brown, at the time when the said Brown made oath as aforesaid.—Wherefore the said Norman doth claim the said ship, her tackle, &c., as his property, and prays that the same may be restored to him, and that he may have his costs in this matter sustained, and his damages occasioned by the seizure and detention of the said ship, &c. so unlawfully made, to him decreed, &c.[1]

LUTHER MARTIN,
for the Claimant.

May 14th, 1803. A warrant of appraisement being issued agreeably to the provisions of the Act of Congress, and the ship valued by three persons appointed by the Court, the Claimant filed a bond, with condition that he should "pay the valuation, in case the ship should be condemned, and in all things comply with the final judgment to be rendered in the premises."

No. 3.

Libel of Information against a ship for the violation of the Embargo Act of 1808, *Chap.* 5, [5,] *and* 8, [8]; *with a Supplemental Libel and a Claim.*

Libel of Information.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District of Massachusetts.*

BE IT REMEMBERED, That on this twenty-fifth day of July, in the year of our Lord eighteen hundred and eight, before the Honorable John Davis, Judge as aforesaid, comes

[1] See note, p. 413.

Joseph Wilson, Esquire, Collector for the Port of Marblehead and Lynn, in the District aforesaid, and, in the name and behalf of the United States, and all others concerned, libels, propounds, and gives the said Court to understand and be informed, that on the eleventh day of May, now last past, at the Port of Lynn aforesaid, and on waters navigable from the sea by vessels of more than ten tons burden, he the said Collector did seize and take into custody a certain brigantine or vessel of the United States of about one hundred and nineteen tons burden, and called *The William*, for a violation of the law, as hereinafter specified. And the said Wilson, Collector as aforesaid, doth aver, that during the continuance of a certain Act of the United States, entitled "An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States," to wit, on the said eleventh day of May, at the Port of Lynn aforesaid, certain goods, wares, and merchandise of domestic growth and manufacture, to wit, ten hams of bacon, a number of barrels of flour, and sundry other merchandise to your libellant unknown, were by the privity and procurement of the owners, agents, and factors of the said brigantine, taken from on board of the said vessel and put on board of a certain other vessel, called *The Mary*, with intention to proceed with the said merchandise to some foreign port or place, contrary to the Act aforesaid, and also against a certain other Act of the United States, entitled "An Act supplementary to the Act entitled 'An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States.'" Whereby, and by force of the said Act, the said first mentioned brigantine or vessel hath become forfeited to the uses therein specified. Wherefore the said Wilson, Collector as aforesaid, prays advisement of your Honor in the premises, and that said brigantine or vessel may be decreed to be and remain forfeited accordingly. By GEORGE BLAKE,

Attorney for Libellant, and United States Attorney for Massachusetts District.

Supplemental Libel.

(Filed by consent.)

DISTRICT COURT OF MASSACHUSETTS.

United States v. *Brig William.*

AND the said Wilson, Collector as aforesaid, for and as another cause of forfeiture, doth further aver, that, during the continuance of an Act entitled "An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States," to wit, on the seventeenth day of March last past, in a place called Long Island Sound, being within the jurisdiction of the United States, and on waters navigable by vessels of more than ten tons' burden, and within the jurisdiction of this Court, the said brigantine then and there, and until the seizure hereinbefore mentioned, being owned by citizens of the United States, divers goods and merchandises of domestic growth and manufacture, to wit, thirty barrels of tar, thirty barrels of pitch, and thirty barrels of rice, being then and there part of the cargo on board of said brigantine, by the connivance and procurement of the master, owners, and factors of said brigantine, were taken from said brigantine, and there immediately afterwards put on board another ship or vessel, called *The Nancy*, with intent fraudulently to violate the Act aforesaid, and also another Act of the United States, entitled "An Act supplementary to the Act entitled 'An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States,'" and with the further intent to proceed to a foreign port or place with the goods and merchandises aforesaid, contrary to the Acts aforesaid, whereby the same brigantine became and was forfeited; and the said Wilson prays the advisement of this Honorable Court in the premises, and that the same may be decreed forfeited accordingly.

Claim.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District of Massachusetts.*

BENJAMIN IRESON, of Lynn, in said District, and Andrew Davis of Newburyport, in said District, merchants, respectfully beg leave to represent, that they are owners, and the said Andrew is master of the brigantine *William*, which has lately been seized, and is now detained by Joseph Wilson, Esquire, Collector of the Port of Marblehead and Lynn, in the District aforesaid, for a supposed violation of an Act entitled "An Act laying an Embargo on all ships and vessels within the ports and harbours of the United States," and also of an Act entitled "An Act supplementary to the Act entitled 'An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States,'" whereby the said Joseph Wilson alleges the said brigantine has become forfeited. And the said Benjamin Ireson and Andrew Davis now claim the said brigantine, and say the facts stated in said Libel of said Joseph are untrue, and that they will give bond to defend the prosecution thereof, and to respond the cost in case they shall not support their claim. And they pray your Honor to appoint three proper persons to appraise said brigantine, and that the same may be delivered to the said Benjamin Ireson and Andrew Davis immediately, upon giving bond with one or more sureties approved of by your Honor, and complying with all the requisitions of the law in this behalf, and as in duty bound shall ever pray.

BENJAMIN IRESON,
ANDREW DAVIS,
By their Proctor, SAMUEL PUTNAM.

August 13*th*, 1808.

No. 4.

Libel of Information against Merchandise for not being included in the Manifest, founded on Stat. 1799, *Chap.* 128, [128,] § 24; *with a Claim and Answer.*

Libel of Information.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, SS.

District Court of United States, begun and holden at Boston, within and for the District of Massachusetts, on the Second Tuesday of September, in the year of our Lord one thousand eight hundred and thirty-one, and continued by adjournment to the twenty-third day of said September.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District aforesaid.*

BE IT REMEMBERED, that on this twenty-third day of September, in the year of our Lord eighteen hundred and thirty-one, before the Honorable John Davis, Judge as aforesaid, comes into Court, in his own proper person, Andrew Dunlap, Esquire, Attorney of the United States for the aforesaid District of Massachusetts, and, in the name and behalf, as well of the United States, as of David Henshaw, Esquire, Collector for the Port of Boston and Charlestown, in said District, and of all other persons concerned, propounds and gives the said Judge to understand and be informed, that, at a time past, to wit, on the fourteenth day of September instant, at the Port of Boston and Charlestown, in said District, and on waters navigable from the sea by vessels of ten or more tons' burden, he, the said David Henshaw, Collector as aforesaid, did seize and now hath in his custody, as being forfeited, for having been imported into the United States, contrary to law, the following goods, wares, and merchandise, to wit, one hempen cable and one hempen hawser. For that, at a time past, to wit, on the fifth day of said September, the said goods, wares, and merchandise were brought in a certain brig or vessel, called *The*

Moscow, then and there belonging to a citizen or citizens, inhabitant or inhabitants of the United States, whose name or names are to the said Attorney of the United States as yet unknown, from a foreign port or place, that is to say, the Port of Cronstadt in Russia, into the United States, to wit, into the Port of Boston and Charlestown aforesaid, and that the said goods, wares, and merchandise, then and there belonging or consigned to the master, the mate, or the crew of the said vessel then and there, were not described or included in the manifest or manifests of the cargo of the said ship or vessel, as is required by law, against the peace and dignity of the said United States, and contrary to the form of the Statute of the said United States, in such case made and provided. By reason whereof, and by force of said Statute, the said goods, wares, and merchandise have become forfeited to the uses therein specified. Wherefore the said Attorney of the United States prays advisement of the Court here, in the premises, and for monition and other proper process, to the end that the same may be decreed to be and remain forfeited accordingly.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Interrogatories to any Claimant or Claimants in the above entitled cause.

Where was the property purchased, and when and of whom was it purchased, and to whom did it belong? Please to annex correct copies of the original bill of the purchase thereof.

ANDREW DUNLAP, *for Libellants.*

Claim and Answer.

DISTRICT COURT OF THE UNITED STATES, SS.
DISTRICT OF MASSACHUSETTS, OCTOBER, 1831.

United States, Libellants,

v.

One hempen Cable and One Hawser.

AND now come into Court Benjamin Rich and S. H. Rich, of the City of Boston in said District, merchants and partners under the firm of Benjamin Rich and Son, and John Norris, of said Boston, master mariner, and claim the said hempen cable and hempen hawser, and for answer unto the said Libel they say, that they are the lawful owners of the said brig or vessel, called *The Moscow*, in said Libel mentioned, and which vessel, on the said fifth day of September, had arrived from a voyage upon which she had sailed from said Boston to Matanzas in the Island of Cuba, and thence to said Cronstadt, and thence back to said Boston, under the command of the said Norris, master. And these Claimants further answering say, that during the passage of said vessel from said Boston to said Matanzas she struck upon a bank or reef, and became fixed and immovable, whereby it became necessary to carry out an anchor with the stream-cable then on board of said vessel attached to it, for the purpose of heaving said vessel off from said bank or reef; and that after that purpose was accomplished and the said vessel was afloat, the said master, in order to prevent her from again getting upon the said bank or reef, which was likely to happen, if they should stop for the purpose of weighing the anchor, cut away a large portion of said cable, to wit, about twenty-five fathoms thereof, and proceeded on his voyage; by reason of which cutting away the said cable was rendered incomplete and unfit for use, as the stream-cable of said vessel, and that the same cable was otherwise incapable and unworthy of being repaired, inasmuch as it

was old, and so far worn and decayed as to render the substitution of a new one altogether necessary. And that accordingly, upon the arrival of said vessel at said Cronstadt, the said master purchased a new stream-cable in order to supply the place of the one thus worn, cut, and rendered useless. And these Claimants further answering say, that on the arrival of said vessel at said Cronstadt, it also appeared, that the hawser then on board of her was strained, weak, and unfit for further use, whereby it became necessary to procure a new one, and that one was purchased accordingly by the said master for the use of said vessel, and for the sole purpose of supplying the place of that last named. And these Claimants further answering say, that the stream-cable and hawser, so purchased as aforesaid, were necessary for the equipment and safe navigation of said vessel on her said voyage, and were immediately taken on board, as parts of her ground-tackle and equipment, and solely for the purpose of being used as such; that they were prepared in the ordinary manner for immediate service, and were stowed in that part of the vessel where the stream-cable and hawser of a vessel in actual service are always stowed and kept; that during the passage from said Cronstadt to Boston aforesaid, there was no other stream-cable nor hawser on board of said vessel, used or intended to be used, as a part of her ground-tackle or equipment, nor kept nor stowed in the place where such cable and hawser are or ought to be stowed and kept; and that in all particulars the same were intended to be, and were kept to be, used, as being the ordinary tackle and furniture of said vessel.

And these Claimants further answering say, that the stream-cable and hawser, so purchased at said Cronstadt for the use and necessary equipment of said vessel, and so kept, and stowed, and brought in said vessel as aforesaid, are the same mentioned in said Libel, and none others; and they deny, that the said cable and hawser belonged or

were consigned to the master, mate, or crew of said vessel, saving the interest of said master as part owner of said vessel, or were brought or imported into the United States in said vessel, as goods, wares, and merchandise, which should have been included or described in the manifest of the cargo of the said vessel, or that the same were brought or imported into the said United States contrary to law or to the form of the Statute in such case made and provided; but, on the contrary thereof, they aver, that the same were necessary parts of the tackle, apparel, and furniture of said brig, and were in actual use as such, at the time of the said seizure; and that the same were unlawfully, and without any justifiable or probable cause, seized by the said Collector, and are still unjustly and without color of right detained from the Claimants.

And for answer to the interrogatory propounded in said Libel, the Claimants further answering say, that the said cable and hawser were purchased by the said Norris in his capacity of master and part owner of said brig, of one John Heth, at St. Petersburgh in Russia, on the fourteenth day of June last past, and that the same belong to the said Claimants, as owners of said vessel, being part of her necessary tackle and equipment, and the original bill of sale thereof to the said master is hereto annexed. Wherefore the said Benjamin Rich, Samuel H. Rich, and John Norris do claim the said hempen cable and hempen hawser, as their property; and pray that they may have the same restored to them accordingly, and that they may have their costs in this matter sustained, and their damages, occasioned by the seizure and detention of said cable and hawser so unlawfully made, to them decreed.[1]

BENJAMIN RICH,
SAMUEL H. RICH,
JOHN NORRIS.

CHARLES G. LORING, *Proctor.*

[1] See note, p. 413.

Massachusetts District Court, September Term, (October 14th,) 1831. Sworn to in Court.

Attest, JOHN W. DAVIS, *Clerk.*

Account Annexed.

Captain John Norris, of *The Moscow*,

To Mr. John Hoth, Dr.

To 1	Cable,	12	inches,	80	fathoms	.....	pds,	72.30
" 1	"	8	"	90	"	.....	"	35.32
" 1	"	5½	"	90	"	.....	"	17.22

Poods 126.04

At 9½ rubles per pood, R. 1198.

Received the same for JOHN HOTH,

P. BRAMEW.

St. Petersburgh, June 14th, 1831.

No. 5.

Libel of Information against a ship for unlading without a Permit, founded on Stat. 1799, *Chap.* 128, [128,] § 50; *with a Claim and Answer.*

Libel of Information.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

District Court of the United States for the District of Massachusetts, begun and holden at Boston, within and for the District of Massachusetts, on the fourth Tuesday of June, in the year of our Lord one thousand eight hundred and thirty-one, and continued by adjournments to the nineteenth day of August in the year aforesaid.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District aforesaid.*

BE IT REMEMBERED, that on this nineteenth day of August, in the year of our Lord eighteen hundred and thirty-

one, before the Honorable John Davis, Judge as aforesaid, comes into Court Andrew Dunlap, Esquire, Attorney of the United States for the aforesaid District of Massachusetts, and, in the name and behalf, as well of the United States as of David Henshaw, Esquire, Collector for the Port of Boston and Charlestown, in said District, and of all other persons concerned, propounds and gives the said Judge to understand and be informed, that at a time past, to wit, on the seventeenth day of August instant, at the Port of Boston and Charlestown, in said District, and on the waters navigable from the sea by vessels of ten or more tons' burden, he, the said David Henshaw, Collector as aforesaid, did seize, and now hath in his custody, as being forfeited, a certain vessel or brig, called *The Maine*, her tackle, apparel, and furniture. For that at a time past, to wit, on the sixteenth day of August instant, certain goods, wares, and merchandise, to wit, six hogsheads of West India rum, being of the value, according to the highest market price at the Port of Boston, of six hundred dollars, were brought in the said brig or vessel from a foreign port or place, into the United States, to wit, into the Port of Boston and Charlestown, and that thereafterwards, on the same day last mentioned, the said goods, wares, and merchandise, having been imported and brought as aforesaid, were unladen and delivered from said ship or vessel, within the United States, to wit, at the Port of Boston and Charlestown, without a special license or permit from the Collector, Naval Officer, or any other competent officer of the said port, (although a Collector, Naval Officer, and other officers of the customs were then and there duly and legally established, and resident at said port,) for such unlading and delivery, and contrary to the Statute in such case made and provided. By reason whereof, and by force of said Statute, the said brig or vessel, her tackle, apparel, and furniture, have become forfeited to the uses therein specified; wherefore the said At-

torney prays advisement of the Court here in the premises, and for monition and other proper process, to the end that the same may be decreed to be and remain forfeited accordingly.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Interrogatories to any Claimant in this Case.

From what port did the brig *Maine* sail last before her arrival in Boston, and what cargo did she bring from that port? Please to annex invoices, bills of lading, and all papers relative to her last outward and homeward voyage.

A. DUNLAP, *Attorney of United States.*

Claim and Answer.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, AUGUST, 1831.

United States, Libellants, v. *The Brig Maine.*

AND now come into Court Samuel Winter, of Bath, and Stephen Whitmore, of Bowdoinham, in the County of Lincoln, and District of Maine, merchants, and claim the said brig, her tackle, apparel, and furniture, and for answer unto the said Libel they say, that on the sixteenth day of May last past, being the lawful owners of said vessel, they despatched her upon a voyage to the West Indies, and thence to Boston, in said District of Massachusetts, under the command of Benjamin Foster, as master of said vessel, with a cargo of lumber, which they directed him to sell, and the proceeds thereof to invest in molasses, as also certain other funds, which they furnished for that purpose, and to proceed therewith to Boston aforesaid. And these Claimants further say, that, in their instructions to the said master, they expressly

ordered him not to take on board any rum or sugar to be brought home in said vessel. And these Claimants further say, that the said vessel did proceed upon her said voyage, and did arrive at the Port of Boston aforesaid, on the sixteenth day of August instant, laden with a cargo of molasses on their account, and that they had not any hogsheads, casks, or other vessels containing rum, or other distilled spirits, on board of said brig, other than such small quantity as may have constituted a part of her sea-stores for the officers and crew; and that they do not know, nor admit, that any other person or persons had any on board, nor that any were taken out of, or landed from, said vessel, at any time or place during her said voyage, or since her arrival within the waters of the United States. Wherefore the said Samuel Winter and Stephen Whitmore do claim the said brig, her tackle, &c., as of their property, and that the same may be restored to them accordingly, and that they may have their costs in this matter sustained, and their damages occasioned by the seizure and detention of said brig, so unlawfully made, decreed to them.[1]

SAMUEL WINTER.

CHARLES G. LORING, *Proctor.*

Sworn to before the Court, June Term, 1831, viz. 19th August, 1831, by said Samuel Winter.

Attest, JOHN W. DAVIS, *Clerk.*

And now in further answer to said Libel, the said Winter, in behalf of himself, and the other Claimant of said brig *Maine*, by leave of the Court for that purpose obtained, annexes to this his answer the original letter of instructions to the master of said vessel, and the account of the sales of her outward cargo, and of the investment of the proceeds thereof

[1] See note, p. 413.

or return cargo, which documents he prays may be taken as part of his answer aforesaid.

CHARLES G. LORING, *Proctor.*

[Letter of instructions and account of sales annexed.]

No. 6.

Libel of Information against a ship for being employed in a trade other than that for which she was licensed, founded on Stat. 1793, *Chap.* 52, [8,] § 8; *with an Answer.*

Libel of Information.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

BE IT REMEMBERED, that at a District Court of the United States for the District of Massachusetts, holden at Boston, within and for the District aforesaid, on the first Tuesday of December, in the year of our Lord one thousand eight hundred and thirty, and continued by adjournment to the seventeenth day of December, in the year aforesaid, comes into Court, on the said seventeenth day of December, Andrew Dunlap, Esquire, Attorney of the United States for the said District of Massachusetts, and, in the name and behalf, as well of the United States, as of Isaiah L. Green, Esquire, Collector for the Port of Barnstable, in said District, and of all other persons concerned, propounds and gives the said Court to understand and be informed, that at a time past, to wit, on the thirteenth day of December instant, at Provincetown, in the said District, and on the waters navigable from the sea by vessels of ten or more tons' burden, he, the said Isaiah L. Green, Collector as aforesaid, did seize and cause to be seized, and hath now in his custody, as being forfeited, a certain schooner or vessel of the United States,

called *The Seventh Son*, of the burden of twenty tons and upwards, to wit, eighty-seven tons and eighty-five ninety-fifths; for that the said vessel, at a time past, to wit, on the seventh day of April last past, then belonging to Ephraim Cook, Jesse Cook, and John H. Pearson, citizens of the United States, was duly licensed, according to the laws of the United States, for the cod fishery, by the Collector for the Port of Boston and Charlestown, in said District of Massachusetts; and the said Attorney of the United States doth further propound and allege, that during the period of time for which the said vessel was licensed as aforesaid, she was employed in a trade other than that for which she was licensed as aforesaid, to wit, in importing from a foreign port or place called Labrador, a large quantity of merchandise, to wit, three thousand pounds of whalebone, into the Port of Boston and Charlestown, in the said District of Massachusetts; and the said Attorney of the United States doth further propound and allege, that the aforesaid merchandise was imported in the said vessel, in the manner aforesaid, at a time past, to wit, on the twentieth day of September last past, into the aforesaid Port of Boston and Charlestown, and that the said whalebone was then and there unladen and delivered from said vessel at the said Port of Boston and Charlestown, without a permit from the Collector or any other competent officer of said port for such unlading and delivery; all which is contrary to the Statute in such case made and provided. By reason whereof, and by force of said Statute, the said schooner *Seventh Son* has become forfeited to the uses specified by law. Wherefore the said Attorney prays advisement of the Court here in the premises; and for monition and other proper process, to the end, that the same may be decreed to be and remain forfeited accordingly.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Interrogatories to any Claimant or Claimants of the above vessel.

First. Do you know any thing respecting the whalebone described in the foregoing libel? If yea, state where it was brought from; what was paid for it; when and where it was imported into the United States; what it sold for here; and whether it was or was not landed without a Custom-House permit.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Answer.

DISTRICT COURT OF THE UNITED STATES.
MASSACHUSETTS DISTRICT, JANUARY 7TH, 1831.
United States v. *Schooner Seventh Son.*

AND now, Ephraim Cook, Jesse Cook, and John H. Pearson, averring themselves to be the owners of the said schooner, wholly denying the truth of the several charges and allegations in said Libel contained, say, that said schooner has not been engaged or employed in any trade other than that for which she was duly licensed according to law, nor in violation of any law of the United States; wherefore they pray that said Libel may be dismissed, and that said schooner may be restored to them.

B. THOMSON,
Agent for the said Owners.

No. 7.

Libel of Information against the proceeds of a ship (after it had been decreed to be sold for the payment of the wages of the mariners) to recover certain tonnage duties and light money, said ship being owned in part by persons not resident in the United States, founded on Stat. 1790, *Chap.* 57, [30,] § 1, *and Stat.* 1804, *Chap.* 57, [57,] § 6.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

District Court of the United States of America, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of March, in the year of our Lord one thousand eight hundred and thirty-four, and continued by adjournments to Friday, the twenty-first day of March, in the year aforesaid.

BE IT REMEMBERED, that on this twenty-first day of March, in the year aforesaid, before the Honorable JOHN DAVIS, Judge of said District Court, comes into Court Andrew Dunlap, Esquire, Attorney of the United States for the said District of Massachusetts, and, in the name and behalf of the United States, libels, propounds, and alleges as follows:

First. The said Attorney of the United States doth propound and allege, that a certain ship or vessel, called *The Rasselas*, of the burden of three hundred and seven tons and twenty-six ninety-fifths of a ton, on the twenty-seventh day of September last past, arrived at the Port of Boston and Charlestown, in said District, from foreign ports or places in foreign countries, that is to say, from Canton and Manilla in the East Indies; that John Dominis was then and there master of said vessel or ship; that the said ship was then and there, on said twenty-seventh day of September, duly entered in the Custom House of the United States for said Port of Boston and Charlestown.

Secondly. The said Attorney of the United States doth further propound and allege, that the said ship or vessel was then and there owned in whole or in part by John Ebbetts,

William French, and John C. Jones, citizens of the United States, then severally residing in a foreign country, not being in the capacity of consuls or agents for, or partners in, some house of trade or copartnership, consisting of citizens of the United States, actually carrying on trade within the United States.

Thirdly. The said Attorney of the United States doth further propound and allege, that by the laws of the United States, the said ship was not then and there entitled to the benefits of a registered ship of the United States, and that, upon the arrival of the said ship or vessel at the Port of Boston and Charlestown, and the entry of said ship at the Custom House, as is hereinbefore alleged, propounded, and set forth, there became due and payable, and still remains due and payable to the United States from said ship, by the laws of the United States, the sum of three hundred and seven dollars and twenty-seven cents, as tonnage duties and light money, an account whereof is contained in the schedule annexed to this Libel, and which the said Attorney of the United States propounds as a part thereof.

Fourthly. The said Attorney of the United States doth further propound and allege, that the said ship or vessel is bound, by the Maritime Law, to the United States for the payment of said duties; and that the said United States have a lien upon the said ship or vessel and her appurtenances, for the payment of said duties, for the recovery of which this civil and maritime cause is now instituted in this Honorable Court.

Fifthly. The said Attorney of the United States doth further propound and allege, that since the arrival of the said ship or vessel, as is hereinbefore alleged and set forth, the said ship or vessel, with her appurtenances, has been attached, condemned, and decreed to be sold for the payment of the wages due the mariners thereof, by the process and decrees of this Honorable Court, as fully appears in the

record of the proceedings in the civil and maritime cause of one Owen Jones and others against the ship *Rasselas*, instituted at the December Term of this Honorable Court, in the year one thousand eight hundred and thirty-three, and which cause is now on the docket of this Honorable Court, at the present term thereof, and in which cause there has been a remnant of the sales of said ship or vessel and her appurtenances remaining in the registry of this Court after the payment of the claims of the Libellants and the costs and expenses in said cause, and which remaining proceeds of said sale are more than sufficient to discharge the claim of the United States, for the recovery of which this civil and maritime cause is now instituted.

Wherefore the said Attorney of the United States, in behalf of the United States, and at the request of the Collector of the United States for the Port of Boston and Charlestown, in said District, files this Libel, and institutes this civil and maritime cause against the proceeds of the sale of said ship or vessel and her appurtenances, now remaining in the registry of this Honorable Court; and the said Attorney prays, that public monition may be given of the filing of this Libel, according to the law and usage of Admiralty Courts, that trial may be had thereon, and that the United States may have decreed to them what may be found justly and legally due to them in the premises, to be paid from the proceeds of the said ship or vessel with her appurtenances, now remaining in the registry of this Honorable Court.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Account Annexed.

Boston Custom House, September 27th, 1833.

Ship *Rasselas,*

To the United States, Dr.

For tonnage duties and light money of said vessel, she being owned in part by persons not residents of the United States:

307$\frac{27}{95}$ tons, as per register, at $1 per ton $307.27

The Rasselas entered at this office September 27th, 1833, from Canton and Manilla.

No. 8.

Libel of Information against a ship for a violation of the Act relating to Passenger Vessels, Stat. 1819, *Chap.* 170, § 2; *with a Claim and Petition for the Restoration of the Ship on Bond.*

Libel of Information.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the fourth Tuesday of June, in the year of our Lord one thousand eight hundred and thirty-two, and continued by adjournment until Friday, the sixth day of July, in the year aforesaid.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District aforesaid.*

BE IT REMEMBERED, that on this sixth day of July, in the year of our Lord eighteen hundred and thirty-two, before the Honorable John Davis, Judge as aforesaid, comes, in his own proper person, Andrew Dunlap, Esquire, Attorney of the United States for the aforesaid District of Massachusetts,

and in the name and behalf, as well of the United States, as of David Henshaw, Esquire, Collector for the Port of Boston and Charlestown, in said District, and of all other persons concerned, propounds and gives the said Judge to understand and be informed, that at a time past, to wit, on the second day of said July, at the Port of Boston and Charlestown, and on the waters navigable from the sea by vessels of ten or more tons' burden, he, the said Henshaw, Collector as aforesaid, did seize, and now hath in his custody, as being forfeited, a certain schooner or vessel, called *The Water-Witch*, of the burden of sixty-nine tons and ninety-four ninety-fifths of a ton, according to Custom-House measurement, of which said schooner or vessel one Robert Field was then and there master; for that the said Field, so being master aforesaid of the schooner or vessel, at said Boston, then and there, to wit, on the second day of July, (the said schooner or vessel then and there being owned, in whole or in part, by a subject or subjects of a foreign country, whose name or names are to the said Attorney of the United States as yet unknown,) with force and arms did bring and convey, in the said schooner or vessel, from a foreign port or place into said Boston, a great number of passengers, that is to say, seventy-six passengers, then and there being a greater number of passengers than two for every five tons of said schooner or vessel, according to Custom-House measurement, which said number of seventy-six passengers then and there exceeded the said proportion of two to every five tons of the said schooner or vessel by the number of forty-eight passengers in the whole; against the peace and dignity of the United States, and contrary to the form of the Statute of the United States in such case made and provided. By reason whereof, and by force of said Statute, the said schooner or vessel has become forfeited to the uses therein specified; wherefore the said Attorney prays advisement of the Court here in the premises, and for mo-

nition and other proper process, to the end, that the same may be decreed to be and remain forfeited to the United States.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Interrogatories to any Claimant in the above cause.

First. Where was the schooner *Water-Witch* built, and where is she now registered?

Secondly. Who are her owners, and where do they reside?

Thirdly. Where did she take in her passengers, which she brought to Boston at her late arrival at Boston, and how many were they?

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Claim and Petition.

DISTRICT COURT OF THE UNITED STATES FOR THE MASSACHUSETTS DISTRICT, JUNE TERM, A. D. 1832.

United States, Libellant, v. *Schooner Water-Witch.*

AND now, Robert Field of New Brunswick, master mariner, respectfully represents to this Honorable Court, that he is the master of said schooner *Water-Witch*, and that Isaac Ketchum of St. John is the sole owner; that said schooner has been seized by the Collector of the Port of Boston and Charlestown, for an alleged violation of the laws of the United States, and that a Libel against said vessel is now pending in this Honorable Court. And the said Field, not admitting the several allegations in said Libel to be true, claims the said schooner and her appurtenances in behalf

of the said owner, and is ready to give bond to defend the prosecution thereof; and he prays that said schooner and her appurtenances may be duly appraised, and the same delivered to him upon his giving bond according to the Statute in such case made and provided.

ROBERT FIELD.

FRANCIS BASSETT, *Proctor.*

No. 9.

Libel of Information against a master of a ship for discharging a seaman in a foreign country, without leaving three months' extra wages, founded on Stat. 1803, *Chap.* 62, [62,] § 3.

Libel of Information.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

BE IT REMEMBERED, that at a District Court of the United States for the District of Massachusetts, holden at Boston, within and for the District aforesaid, on the third Tuesday of March, in the year of our Lord one thousand eight hundred and thirty-one, and continued by adjournments to the twenty-second day of April, in the year of our Lord one thousand eight hundred and thirty-one, comes into Court, on the said twenty-second day of April, Andrew Dunlap, Esquire, Attorney of the United States for the said District of Massachusetts, and, in the name of the United States, gives the said Court to understand and be informed as follows;

That on or about the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and thirty, Samuel Kender was shipped as chief mate of the brig

Mary and Nancy, a vessel of the United States, to perform a voyage in the said vessel, whereof was then and there master, George R. M. Weld, of Roxbury, in the said District of Massachusetts, on the seas within the jurisdiction of this Honorable Court, to foreign parts.

The said Attorney of the United States further propounds and alleges, that the said voyage was described in the shipping papers, signed by the said Kender, and the rate of wages of the said Kender specified therein, which rate of wages is unknown to the said Attorney of the United States, and which shipping paper is in the possession of the said Weld, which he, the said Attorney of the United States, prays may be produced in the trial of this cause.

And the said Attorney of the United States further propounds and alleges, that the said Kender, when he was shipped on board the said vessel, as aforesaid, was a citizen of the United States; that the said vessel then and there belonged to a citizen or citizens of the United States; that the name of the said Kender was entered and borne on the list of the ship's company, and that he was designated on the same as a citizen of the United States, delivered by the said master to the Collector for the Port of Boston and Charlestown, whence the said vessel sailed on her outward voyage, and of which list the said master was furnished with a certified copy, according to law.

And the said Attorney of the United States further propounds and alleges, that the said Kender sailed on said voyage in said vessel, commanded by the said Weld, and in the course of the same, at Buenos Ayres, a foreign country, at a time past, to wit, in the month of January last past, the said Kender was discharged, with his own consent, from said vessel by the said Weld, then and there master of the same, in pursuance of a written agreement between the said Kender and the said master, which said agreement the said Attorney of the United States prays that the said Weld may

be required to produce in the trial of this cause, and the said Weld then and there paid the said Kender his actual wages due at the time of his discharge, and no more or extra wages.

And the said Attorney of the United States further propounds and alleges, that the said Weld, master as aforesaid, did not pay to the Consul, Vice-Consul, or Commercial Agent at said Buenos Ayres, the three months' pay over and above the wages then due to the said Kender, as is required by the laws of the United States.

Wherefore the said Attorney of the United States prays the advisement of the Court here in the premises, that process may issue against the said George R. M. Weld, requiring him to appear and answer this information, that trial may be had thereon according to the law and usage of Admiralty Courts, and that the said Weld may be decreed to pay into the registry of this Court such sum of money as he may be bound in law and justice to pay, to be disposed of according to law.

ANDREW DUNLAP,
Attorney of the United States for the District of Massachusetts.

Boston, April 22d, 1831.

Interrogatories propounded to the Respondent, and to which his Answer under oath is required.

First. Did not the said Samuel Kender, mentioned in the foregoing Libel, ship as the mate of the brig *Mary and Nancy,* to perform a foreign voyage, in the year eighteen hundred and thirty, and sign shipping articles? If yea, state the particulars of the contract, the rate of wages, and also produce the shipping articles.

Secondly. Did he sail on the said voyage? If yea, when and where did he cease to be mate of said brig, and was there any agreement in writing relative to his discharge, witnessed by Captain A. M. Atwater?

Thirdly. Did you pay him any money, at any time or times, on account of his wages? And when and where did you pay him any money? And did he sign any receipt or receipts? If yea, please to produce the receipt or receipts signed by him.

Fourthly. Did you not make entries or memoranda in some book or books, or on some paper, of payments made by you in the course of the voyage? If yea, please to produce your *original* entries of payments, and your *original* portage bills.

ANDREW DUNLAP,
Attorney of the United States.

Boston, April 22d, 1831.

No. 10.

Petition for the Remission of a Forfeiture.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District of Massachusetts.*

THE Petition of Charles Hare of Limerick, in Ireland, in the United Kingdom of Great Britain and Ireland, respectfully shows, that he is the sole owner, and master, of the *Brig Ward* and cargo now libelled in this Court for a violation of the law of the United States; and your petitioner, confessing that said vessel and cargo have in law become forfeit to the United States, truly and particularly sets forth the circumstances of his case as follows, to wit: That in February last past it was the intention of your petitioner to proceed in said brig in ballast from Limerick to St. Johns in New Brunswick, take in a cargo, and return to said Limerick; that he was informed at said Limerick, by an officer

of the Customs, in whose judgment he placed the utmost reliance, that, instead of going in ballast, he might proceed to St. Ubes in Portugal and take in a cargo of salt, and in his way to St. Johns enter the port of Boston, in the United States, and dispose of his cargo, proceed to St. Johns, take in the cargo which was the object of his voyage, and return to Limerick; that accordingly your petitioner did, on the fourth day of February, leave said Limerick, in said brig, in ballast, having cleared for St. Ubes in Portugal, thence to St. Johns, in New Brunswick, and back to said Limerick; that he proceeded on said voyage to St. Ubes in Portugal, took in a cargo of salt, and that, while on his way to St. Johns in New Brunswick for the purpose of receiving a cargo, as before stated, which was the object of the voyage. and while in the Gulf Stream in a violent gale, said brig sprung a leak, and was otherwise injured, so that it was with difficulty that he reached the port of Boston, where he supposed that he might, without violating any law of the United States, enter and dispose of his cargo and repair his vessel; that on the twentieth day of April he came into the harbour of Boston, and proceeded immediately to the Custom-House to enter his said vessel and cargo, and that the same was accordingly entered. And your petitioner further states, that two days after, while lying in said harbour, he was informed by the Collector of the port of Boston, that his Deputy from a misapprehension of the law had permitted him to enter his vessel and cargo, and that it was contrary to a law of the United States to bring a cargo of salt from a port in Portugal in a British vessel, and that it would be advisable to leave Boston immediately, and proceed on his voyage to St. Johns in New Brunswick with said vessel and cargo.

Your petitioner further states, that he made immediate preparation, so far as he was able, to leave the port of Boston, but, his vessel being in a very leaky condition, and the

crew having all deserted, and no person being on board except the mate and two apprentice boys, the Collector deemed it to be his duty to take possession of said vessel and cargo, and libel the same in this Honorable Court, whereby the same have become forfeited to the United States. Wherefore your petitioner, inasmuch as he had no intention of violating any law of the United States, but supposed that he might lawfully enter his vessel and cargo at the Custom-House in Boston as aforesaid, and was unable to leave said port immediately upon being informed to the contrary, for the reasons herein before assigned, prays that a statement of the foregoing facts, together with this petition, may be transmitted to the Secretary of the Treasury of the United States, that the said forfeiture may be remitted, upon such terms and conditions as may be deemed reasonable and just, according to the Statute in such case made and provided.

(Signed) CHARLES HARE.

FRANCIS BASSETT, *Proctor.*

No. 11.

Petition for the Restoration of Property on Bond, seized for an alleged Violation of the Laws of the United States.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States for the District of Massachusetts.*

THE Petition of ——— ———, ——————————— which have been seized by the Collector of the Customs for the District of ———, and against which a Libel of Information has been filed in the District Court for the District aforesaid, alleging the same to be forfeited for a violation of certain laws of the United States. Your petitioner now

prays your Honor to order the same merchandise to be restored to him upon his giving bond with approved sureties to the United States in a sum equal to the value thereof, to abide the decision of the proper Court thereon, pursuant to the Statute of the United States in such case made and provided.

MASSACHUSETTS DISTRICT, ss. ————

Appeared personally the said ——— ——— and made oath that the foregoing is a true and just claim, and that he shall be able to make due proof thereof, as he verily believes.

Before me, ——— ———, *Clerk.*

MASSACHUSETTS DISTRICT, ————, 18—.

On the foregoing petition, ordered that warrant issue to the Marshal of said District or his Deputy, directing him to cause said merchandise to be appraised on oath by ——— ———. Return to be made as soon as may be.

B.

LIBELS IN ADMIRALTY IN CASES WHERE PRIVATE RIGHTS ARE CONCERNED, WITH CLAIMS AND ANSWERS.

No. 1.

Libel for Mariners' Wages, with a Claim and Answer.[1]

[The following libel and some others in this collection have been drawn from a valuable manuscript relating to the forms and proceedings in the

[1] See Marriot's Formulary, 274; 2 Chitty's General Practice, 534, *note*.

English Admiralty, which was obtained many years ago by an American lawyer then in England, and for the use of which the editor is indebted to the Hon. Judge Davis. The Editor has endeavoured, by alterations in the address and the conclusion of the libels, and in other particulars, to adapt them to the practice of our Admiralty Courts.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of A B, of ———, late mariner of the ship ———. whereof C D now is or late was Master, *against the said ship, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein*, in a cause of subtraction of wages, civil and maritime.[1] And thereupon the said A B alleges and articulately propounds as follows:

First. That in the month of ——— in the year of our Lord eighteen hundred and ———, the said ship ———, whereof the said C D was Master, being at the port of ———, and destined on a voyage from thence to ———, he the said C D by himself or his agent, on the high seas and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of the United States

[1] If the libel be *in personam*, it should commence as follows:

"The Libel and Complaint of A B, of ———, late mariner of the ship ———, whereof C D of ——— now is or lately was master [or owner, as the case may be], *against the said C D*, in a cause of subtraction of wages, civil and maritime," &c.

If the libel be *in personam* and *in rem*, it should commence as follows:

"The Libel and Complaint of A B of ———, late mariner of the ship ———, whereof C D of ——— now is or lately was master [or owner, as the case may be], *against the said ship, her tackle, apparel, and furniture, and also against the said C D*, in a cause of subtraction of wages, civil and maritime," &c.

A corresponding variation should take place in the conclusion of the libel.

and of this Honorable Court, did ship and hire the Libellant to serve as a mariner on board the said ship for and during said voyage at the rate of wages of ——— per month, as schedulate; and that for the due performance of the said voyage the Libellant signed and duly executed certain articles of agreement commonly called the shipping or mariners' articles, which now are in the possession of the said C D, master [or owner] of the said ship, and which he prays may be produced for farther certainty in the premises and for the benefit of the Libellant.[1] That in pursuance thereof, on or about the ——— day of ———, he the Libellant went on board and entered into the service of the said ship as such mariner as aforesaid.

Second. That the said ship, having taken on board a cargo of divers goods and merchandise for the voyage, proceeded therewith and with the Libellant on board for the port of ———, and there safely arrived on or about ———, and delivered her cargo and made freight, and that the Libellant continued on board and in the service of the said ship until the ——— day of ———, when the said voyage, for which he had so engaged, was duly ended, and he was discharged from such service by the said C D, the Master.

Third. That during the whole time he was in the service of the said ship, to wit, from the time when he went on board thereof to the time of his discharge therefrom, as aforesaid, he well and truly performed his duty as a mariner on board the said ship according to his best ability, and was obedient to all the lawful commands of the said master and the other officers of the said ship, and well and truly deserved and is entitled to the wages in the schedule hereunto annexed, amounting to the sum of ———.

Fourth. That all and singular the premises are true, and

[1] See Act of Cong., 1790, c. 56 [29], § 6, making it incumbent on the master to produce the contract and log-book if required. Also, Act of July 20, 1840.

within the Admiralty and Maritime jurisdiction of this Honorable Court, in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays that process, in due form of law, according to the course of Courts of Admiralty, and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said ship, her tackle, apparel, and furniture, wheresoever the same shall be found, and that all persons having or pretending to have any right, title, or interest therein, may be cited to appear and* to answer upon oath[1] all and singular the matters so articulately propounded, and that this Honorable Court would be pleased to pronounce for the wages aforesaid, and for such other relief to the Libellant as shall to law and justice appertain, and *also to condemn the said ship, her tackle, apparel, and furniture, and the party intervening therefor in costs.*[2]

(Signed) A B, *Libellant.*

E F, *Proctor.*

MASSACHUSETTS DISTRICT, ss. ———, 18—

Sworn to by the Libellant before me.[3]

G H, *Clerk.*

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

[2] If the libel be *in personam*, it should conclude as follows:

"WHEREFORE the Libellant prays that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime Jurisdiction, may issue *against the said C D*, and that he may be required to answer upon oath all and singular the matters so articulately propounded, and that this Honorable Court would be pleased to pronounce for the wages aforesaid, and for such other relief to the Libellant as shall to law and justice appertain, *and also to condemn the said C D in costs.*"

[3] In regard to swearing to the libel, see *ante*, p. 127. The oath should be taken before the Clerk of the District Court of the United States or one of the Commissioners of the proper court of the United States.

Schedule Annexed.

Wages due to A B from —— to ——, being —— months —— days, at the rate of —— per month, ... $

Out of which he has received, including Hospital dues, ... $

Sum due, ... $

Claim and Answer.[1]

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now C D of ———, *intervening for his interest in the ship* ———, appears before this Honorable Court, and for Answer to the Libel and Complaint of A B of ——— *against the said ship, and against all persons lawfully intervening for their interest therein,* alleges and articulately propounds as follows:[2]

First. That the Respondent now is the owner of the

[1] A Claim must always be interposed by a party who seeks to defend in a proceeding *in rem*, and in the practice of the American Admiralty it is almost uniformly united with the Answer. The claim is to be found in the allegation of ownership, which is made in the first article of the above pleading.

[2] If the proceeding be *in personam*, the Answer will commence as follows: "And now C D of ———, *master* [*or owner, as the case may be*] *of the ship* ———, appears before this Honorable Court, and, for answer to the Libel and Complaint of A B of ——— *against him the said C D*, alleges and articulately propounds as follows:

First. That the Respondent was the master [or owner] of the said ship ——— during the time the said A B belonged thereto," &c.

said ship ———, and also was the owner of the same during the time the said A B belonged thereto, and that the said A B was duly hired to serve on board the said ship for the voyage, as in the first article in the said libel is propounded; the articles of agreement for which voyage, signed by the said A B, the Respondent doth herewith produce in Court according to the prayer in the said first article.

Second. That the said ship ———, having taken on board a cargo of divers goods and merchandise for the voyage, proceeded therewith for the port of ————, and there safely arrived and delivered her cargo and made freight, as in the second article in the said Libel is propounded.

Third. That whilst the said ——— was at the port of ——— the said A B, &c. [here state the bad conduct of the Libellant, amounting to mutiny or desertion, or other ground of forfeiture of wages, and such other matter showing that the shipping articles were substantially broken, and also any other matters calculated to support and establish the defence.]

Fourth. That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court, in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays, that this Honorable Court would be pleased to pronounce against the Libel aforesaid and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.[1]

(Signed) C D.

I J, *Proctor.*

[1] The following is another form of Answer. (See 2 Chitty's Gen. Pract. 535, *note.*)

[Commencement as above.]

First. [Here state the ownership of the ship, &c.]

Second. Whereas in the first article of the Libel and Complaint of A B, it is among other things alleged and propounded, to wit, [here follows the state-

DISTRICT OF MASSACHUSETTS, SS. ———, 18—.

Sworn to by the Respondent before me,

G H, *Clerk.*

No. 2.

Libel in a Cause of Personal Damage, with an Answer.

[The following libel and answer are founded upon the pleadings, a copy of which the Editor has before him, in the case of *The Lowther Castle*, (1 Hagg. Rep. 384,) wherein Lord Stowell gave judgment for the Respondent, which was subsequently affirmed on appeal before the High Court of Delegates. (2 Hagg. Rep. xi.) The Editor has endeavoured to preserve the facts of that case and the mode in which they were preseuted on each side, making such alterations only as were necessary to give the precedent an American character.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Hon. JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Michael Comerford, of Boston, in the District aforesaid, late a mariner on board the ship Pocahontas, whereof Thomas Baker, of the said Boston, now is or late was Master, against the said Thomas Baker, in a cause of damage, civil and maritime. And thereupon the said Michael Comerford alleges and articulately propounds as follows:

First. That in April, 1823, the ship Pocahontas, whereof the said Thomas Baker was then Master, being in the port

ment, then the answer thereto, showing the same to be false, &c., stating the owner's case at length.]

Third. That all and singular the premises are true, &c.

[Conclusion as above.]

of Boston, and bound on a voyage to China, the said Thomas Baker did, on the high seas, and within the ebb and flow of the tide and within the Admiralty and Maritime Jurisdiction of this Honorable Court, by himself or his agent, ship and hire the Libellant to serve as seaman on board of the said ship, for and during the said voyage; and the said ship, having taken on board her complement of officers and crew, did, on or about the ——— day of the said month of April, proceed thereon, with the Libellant on board, and, having been to China, returned to the Port of Boston aforesaid, with a full ship in the month of June last.

Second. That, during the whole time the Libellant continued on board the said ship, he did well and truly perform his duty on board her, and was obedient to all the lawful commands of the said Thomas Baker the Master, and others his superior officers on board the said ship.

Third. That during the time of the said voyage, and while the ship was lying off Wampoa in China (to wit) on the high seas, and within the ebb and flow of the tide and within the Admiralty and Maritime jurisdiction of this Honorable Court, on the 15th day of October, 1823, whilst the Libellant was in the fore-hold handing up billet wood, Charles Hawkins, the third officer on board the said ship or vessel, charged him with not working so well as he could, nor so fast as another seaman of the name of Robert Long. That the Libellant replied, "that Robert Long worked too fast to last long," or he made use of words to that or the like effect; when the said Charles Hawkins immediately made complaint to Mr. Wilkinson the chief officer, that the Libellant had been very impertinent to him; whereupon, and for no other cause whatever, Mr. Wilkinson then ordered him to be taken from his duty and placed below in irons, where he continued until the 21st of October. That, upon the said Thomas Baker coming on board the ship (from which he had been absent the whole of the beforementioned period), he immediately

upon the complaint being made to him by the said Wilkinson, and without hearing the Libellant in his defence, ordered him to the gangway and caused him to be flogged with three dozen lashes; and, although the Libellant most humbly and repeatedly urged the said Thomas Baker for some water to allay the thirst and fever that he then suffered from the punishment and previous imprisonment, he the said Thomas Baker absolutely refused to let the steward give him any, nor would he permit the mate to give the Libellant an ointment or lotion to apply to his back, but ordered him in his fainting and exhausted state to return to his duty. That the Libellant, in consequence of the flogging aforesaid, suffered extreme pain and was greatly injured thereby.[1]

Fourth. That the Libellant, by reason of the said cruelty and violent assault which he suffered by the act of the said Thomas Baker as before pleaded, has sustained a damage to the amount of one thousand dollars.

Fifth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court, in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE he prays that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue against the said Thomas Baker, and that he may be required to answer upon oath[2] all and singular the matters so articulately propounded, and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and for such other relief to the Libellant as shall

[1] The substance of this *article* may (if the pleader prefers) be stated according to the form of a declaration in Trespass at Common Law, with one count for a battery and another for false imprisonment, to wit: "That the said Thomas Baker, on, &c. with force and arms, &c. assaulted the libellant in and on board of the said ship, &c." See 2 Chitty's Plead. 851, 852, 857.

[2] In regard to requiring the answer to be on oath, see *ante*, p. 124.

to law and justice appertain, and also to condemn the said Thomas Baker in costs.

(Signed) MICHAEL COMERFORD.
Libellant.

A B, *Proctor.*

DISTRICT OF MASSACHUSETTS, ss. *Sept. 20th*, 1824.
Sworn to by the Libellant before me.
J. W. DAVIS, *Clerk.*

Answer.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.
——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

And now, Thomas Baker, of Boston, in the said District, late Master of the ship Pocahontas, appears before this Honorable Court, and for Answer to the Libel and Complaint of Michael Comerford, of the said Boston, late mariner on board the said ship, against him the said Thomas Baker, alleges and articulately propounds as follows:

First. That the Libellant was duly shipped and hired to serve as a seaman on board the said ship Pocahontas, for and during a voyage to China and back again; and that the said ship, with the Libellant on board, proceeded on the said voyage, and, having been to China, returned to the Port of Boston, as is alleged in the first article of the said Libel.

Second. That the Libellant did not, during the whole time he continued on board the Pocahontas, that is to say, from April 1823, until June 1824, well and truly perform his duty on board the ship, nor was he obedient to all the law-

ful commands of the Respondent, the Master, and others, the officers on board the said ship, as in the second article of the Libel is falsely alleged and pleaded. On the contrary, that the Libellant frequently neglected to perform his duty, particularly during his watch; that he was disobedient, and refused or neglected to obey the lawful commands of the master, and others the officers on board the ship, and treated them with great insolence and contempt, and was frequently reprimanded for such conduct; that on such occasions he made insolent and irritating replies, and said he was only on board "a bloody Merchantman," and made use of many other expressions to that or the like effect.[1]

Third. That on the 15th of October, 1823, the Libellant, having been ordered to assist in the handing some billet wood from the fore-hold unto the deck of the ship, was idle and inattentive in the performance of such duty, and in receiving the wood from one person and handing it to another, and thereby greatly impeded and delayed the performance of the said duty; that Charles Hawkins, the third officer or mate of the ship, who was superintending the performance of the work, several times remonstrated with him on his conduct, and desired him to be more diligent, but the Libellant replied with great insolence, and said that he

[1] Upon this article, as it appears in the pleadings in the case of *The Lowther Castle*, (1 Hagg. Rep. 387,) Lord Stowell, in giving judgment, remarked: "The general good character and behaviour of Comerford had been pleaded as usual, in the summary petition [or libel]; and this is met by a direct opposition, contained in an undisputed article of a defensive allegation [the answer], given by the captain. The facts, therefore, of general character and demeanor are directly put in issue between the parties." The only effect of the above article, though it makes a specific charge, viz., that the Libellant had said that he was on board "a bloody merchantman," &c., is to put in issue the *general character* of the Libellant. Where specific acts of misconduct are to be relied on in the defence, they should be distinctly propounded with due certainty of time and place, and other circumstances. —See *Macomber* v. *Thompson*, 1 Sumner R. 385; *The Agincourt*, 1 Hagg. R. 275.

should take it easy,—there was plenty of time, that he should not hurry himself, or to that effect; that the man who handed the wood to the Libellant several times complained of his insolence, by which he was frequently kept with a billet in his hand waiting until the Libellant, who had delivered the preceding billet, and was standing idle, chose to receive the billet from him; and, the said Charles Hawkins observing such man standing with a large billet in his hands, and the Libellant standing idle, he ordered the Libellant to take the billet from such man, to which he insolently replied, that "he would be damned if he would," or words to that effect, and made use of other violent expressions, and treated the said Charles Hawkins with great insolence and contempt, whereupon the said Charles Hawkins made a faithful representation of such conduct to John Wilkinson, the chief officer, the Respondent being then on shore at Canton on the necessary concerns of the ship; that the said John Wilkinson ordered the Libellant to be confined in irons, which was accordingly done, and he, by letter, informed the Respondent of the aforesaid circumstances, who ordered a Court of Inquiry[1] to be held, and on the next day the said John Wilkinson, and the second, third, and fourth officers of the ship assembled, and in the presence of the Libellant examined witnesses as to his conduct, and heard him in his defence; and, it clearly appearing from the testimony of the witnesses that the Libellant had refused to obey the orders of the said Charles Hawkins, and had conducted himself in a mutinous manner, they were of opinion that he was deserving of punishment; and therefore he was continued in confinement until the Respondent returned to the ship; and having returned on the 20th day of

[1] The facts of these pleadings actually occurred on board a ship of the British *East India* Company, by a standing regulation of which no penal infliction upon seamen can take place without the sanction of what is called a Court of Inquiry, consisting of several of the officers on board the ship.

said month, and the conduct of the Libellant, and the proceedings of the said Court of Inquiry, and the evidence given, having been represented to him, he directed that the Libellant should receive thirty-six lashes as a punishment, and the same was accordingly inflicted on the same day; that after the Libellant had received one or two lashes he admitted that he had been very insolent to the said Charles Hawkins and asked to be forgiven; that the Libellant did not suffer any fever from his aforesaid confinement; nor did he at the time he was so punished as aforesaid, urge the Respondent to let him have some water; nor did the Respondent refuse to let the steward give him any, as in the third article of the said libel is falsely alleged and pleaded; that the punishment of the Libellant was necessarily inflicted for the sake of example, and to preserve due discipline on board the ship; that the Respondent did not refuse to permit the mate to give the Libellant any ointment or lotion for his back; nor was the Libellant in a fainting or exhausted state; nor did he suffer extreme pain; nor was he injured in consequence of the punishment he received, as in the said Libel is falsely alleged and pleaded.

Fourth. That all and singular the premises are true, in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays, that this Honorable Court would be pleased to pronounce against the Libel aforesaid and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) THOMAS BAKER,

C D, *Proctor.* (*The Respondent.*)

DISTRICT OF MASSACHUSETTS, ss. *Oct.* 1*st*, 1824.

Sworn to by the Respondent before me.

J. W. DAVIS, *Clerk.*

No. 3.

Another Libel in a Cause of Personal Damage.

[The following Libel contains allegations in distinct articles of several different batteries. The Pleader will observe, that the Libel will be complete although it contains but one of these allegations.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of John Brown, of Boston, in the District aforesaid, late a mariner on board the ship Argus, whereof William Smith, of the said Boston, now is or late was Master, against the said William Smith, in a cause of damage, civil and maritime. And thereupon the said John Brown alleges and articulately propounds as follows:

First. That the said ship, called the Argus, whereof the said William Smith was Master, being, in the month of ——, in the present year of our Lord, at Charleston, in South Carolina, and destined on a voyage from thence to the port of Boston, he, the said William Smith, upon the high seas and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, did hire the Libellant to serve as a mariner on board the said ship during her passage to Boston aforesaid; and that the said ship, having taken in a cargo of goods and merchandise for the voyage aforesaid, did, on or about the ——— day of ———, proceed from Charleston aforesaid, with the Libellant on board, for Boston, where she safely arrived on or about the ———: And that during the whole time of the said voyage, or run, the Libellant did well and truly perform his duty as a mariner of the said ship

(excepting only while he was rendered incapable of performing the same by the cruel usage of him the said William Smith, as hereinafter more particularly pleaded,) and was obedient to all the lawful commands of the said William Smith, the master, and the other officers on board the said ship.

Second. That, while the said ship Argus was on her passage from Charleston to Boston, as aforesaid, to wit, on or about the ——— day of ———, the Libellant being busy in setting the square-sail of the said ship, the said William Smith, without any provocation, did, upon the high seas and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, with his fist clenched, strike the Libellant a blow on the head, which knocked him down, and that then the said William Smith did with his feet, with great force and violence, kick the Libellant several times, whereby he was dangerously hurt and bruised.

[*Third.* That, while the said ship was on her aforesaid passage, to wit, on or about the ——— day of ———, the Libellant being at work on board the said ship, and having hold on the cable thereof, the said William Smith, without any reasonable cause or provocation, did, upon the high seas and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, with a large handspike, with great force and violence strike the Libellant on his right arm, and thereby bruised his said arm very severely and put him in great pain and suffering.]

[*Fourth.* That, while the said ship was off Cape Cod, on the passage aforesaid, he the said William Smith did, upon the high seas and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, with his fist clenched, without any just cause or provocation, strike the Libellant on his left ear with

great force and violence, and thereby knocked him down and caused blood to gush from his ears, nose, and mouth; that the Libellant was thereby deprived of his senses or power of motion for several minutes, and rendered incapable of performing any kind of service for many hours.]

[*Fifth.* That, during the whole time of the aforesaid voyage, the said William Smith behaved with great cruelty and inhumanity towards the Libellant, and on the high seas and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, frequently attempted to throw the Libellant overboard, and threatened to cut his throat, and many times, to wit, on ——— days of the month of ———, did, without any reasonable cause or provocation, violently beat, kick, and ill treat the Libellant, whereby he was put in great fear and danger of his life.]

[*Sixth.* That, by reason of the cruelty exercised by the said William Smith on the person of the Libellant, as pleaded and set forth in the *second*, *third*, *fourth*, and *fifth* articles of this Libel, the flesh of the Libellant became almost totally discolored, and he had therein many severe and dangerous bruises and contusions, and he became very weak, and his constitution was so much impaired and injured, that he has not yet recovered his former health and strength.]

Seventh. That by the cruelty and [repeated] ill usage, which the Libellant received from the said William Smith, as herein before pleaded and set forth, the Libellant was and is damnified in the sum of one thousand dollars.

Eighth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court, in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

[Conclusion the same as in the preceding Libel, p. 454.]

No. 4.

Libel for Collision, with a Claim and Answer.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

The Libel and Complaint of William Nichols, Joshua Flint, and James C. Sears, of Boston, in the District aforesaid, Merchants and Copartners, doing business under the name of William Nichols and Company, owners of the ship Sarah (whereof Charles Cushing now is or lately was Master), her tackle, apparel, and furniture, *against the Ship Ariel (whereof Thomas Welsh now is or lately was Master), her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein,*[1] in a cause of collision, civil and maritime. And thereupon the said William Nichols, Joshua Flint, and James C. Sears allege and articulately propound as follows:

First. That, in the month of December, 1833, the said ship Sarah, whereof Charles Cushing now is and then was Master, was at the port of Calcutta in the East Indies, and destined on a voyage from thence to the port of Boston, with a lading of East India Goods to the amount of $200,000 in value or thereabouts; and was at that time a tight, staunch, and well-built vessel, of the burthen of four

[1] This would be the formulary if the proceeding were entirely *in rem.* If it were *in personam*, it would be, "*against A B, of the said Boston, merchant, owner of the ship Ariel,*" &c. If it were *in rem* and *in personam*, it would be, "*against the ship Ariel, her tackle, apparel, and furniture, (whereof Thomas Welsh now is or lately was Master), and against A B, of the said Boston, Merchant, owner of the said Ship, and also against all persons lawfully intervening for their interest in the said ship,*" &c.

hundred tons or thereabouts; and was then completely rigged and sufficiently provided with tackle, apparel, and furniture; and then had on board and in her service twenty-five mariners or thereabouts, which was a full complement of hands to navigate the said ship on the voyage above mentioned.

Second. That, in the said month of December, 1833, the said ship, provided and manned as aforesaid, sailed from the port of Calcutta on her aforesaid voyage to the port of Boston, and in the prosecution of her said voyage arrived in what is called the outer harbour of the said port of Boston on or about the 3d day of August, 1834, and was there safely moored; and that it being about ten o'clock in the evening of the 5th day of August, 1834, within the ebb and flow of the tide and within the Admiralty and Maritime jurisdiction of this Honorable Court, at her aforesaid moorings, Joseph Connor, the first mate of the said ship Sarah, who then had the watch and was the commanding officer on deck, and that part of the crew which composed the said watch, observed the said ship Ariel, whereof the said Thomas Welsh was then Master, of the burthen of three hundred tons or thereabouts, with all her sails set, sailing up the said outer harbour towards the said ship Sarah; and that thereupon the said Joseph Connor and others of the crew aforesaid, several times with loud and audible voices called to the crew of the said ship Ariel, and desired them to keep clear of the said ship Sarah, and which they had time and tide enough to do, and might with great ease and safety have done, but which they refused, or at least neglected to do; and that notwithstanding the said ship Sarah was then lying at her aforesaid moorings, and could not possibly get out of the way of the said ship Ariel, and notwithstanding there was room sufficient for the said ship Ariel to pass, the crew thereof kept on their course with the wind and tide, and ran their ship, with very great force and violence, foul of and on board the said ship Sarah, and

thereby broke and parted her small bower cable, carried away the bumkin and jib-boom, and damaged her yawl and her standing and running rigging, and otherwise greatly damaged the said ship; and that, had not the crew immediately and with the greatest expedition possible let go another anchor, the said ship Sarah must unavoidably have been very soon on shore; and that the said ship Ariel so continued foul of and on board the said ship Ariel for about two hours, and until the ebb tide forced her off.

Third. That at the time the damage mentioned in the next preceding article happened it was impossible for the said ship Sarah to get out of the way of the said ship Ariel, by reason that the former was properly moored; that there was room enough for the said ship Ariel to steer clear of and pass by the said ship Sarah without doing any damage whatever; and that, if the said Thomas Welsh and the rest of the crew of the said ship Ariel had not refused, or at least neglected, to endeavour to keep clear of the said ship Sarah, as desired by the said Joseph Connor and others, as mentioned in the next preceding article, which it was their duty to do, and which they might with ease and safety have done, the aforesaid damage would not have happened.

Fourth. That the said ship Sarah, before and at the time of receiving the damage from the said ship Ariel, as herein before mentioned, was a tight, strong, and staunch vessel, and that the Libellants then were, and now are, the true and lawful owners of the same and of her tackle, apparel, and furniture.

Fifth. That, immediately after the damages mentioned in the second article of this Libel happened, a Pilot and several men were employed to bring the said ship Sarah to her moorings and to take up her sheet anchor and bower anchor and half a cable which had been broken and turned adrift from the said ship; and that the several other damages mentioned in the second article of this Libel were repaired by

shipwrights and others with all possible despatch, all which cost the sum of three hundred and seventy-five dollars and upwards; and that by reason of the said ship Sarah having been run foul of, or run down, as aforesaid, the Libellants have sustained damages for the services and repairs aforesaid to the amount of three hundred and seventy-five dollars.

Sixth. That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court, in verification whereof, if denied, the Libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Libellants pray, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said ship Ariel, her tackle, apparel, and furniture, and that all persons having, or pretending to have, any right, title, or interest therein may be cited to appear* and answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and to decree such other relief to the Libellants, as shall to law and justice appertain, also to condemn the said Ship, her tackle, apparel, and furniture, *and all persons intervening for their interest therein*, in costs.[2]

(Signed,) WILLIAM NICHOLS,
JOSHUA FLINT,
JAMES C. SEARS,
Libellants.

A B, *Proctor.*

MASSACHUSETTS, SS.

Sworn to by the said William Nichols, Joshua Flint, and James C. Sears, before me.

FRANCIS BASSETT, *Clerk.*

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

[2] The conclusion of the Libel will, of course, vary according to the nature

Claim and Answer.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

And now William C. Prescott of Boston in the District aforesaid, *intervening for his interest in the ship Ariel*, appears before this Honorable Court, and for answer to the Libel and Complaint of William Nichols, Joshua Flint, and James C. Sears, all of the said Boston, Merchants and Copartners, doing business under the name of William Nichols and Company, *against the said ship Ariel, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein*, alleges and articulately propounds as follows:

First. That the Respondent is the true and lawful owner of the said ship Ariel, a vessel of three hundred tons or thereabouts, now lying in the harbour of Boston aforesaid.

Second. And the Respondent, admitting the several matters in the first, fourth, and fifth articles of the said Libel pleaded to be true as therein alleged, further alleges and propounds, that the matters in the second and third articles of the said Libel are in great part falsely alleged, and that the truth is as is hereinafter particularly propounded.

Third. That the said ship Ariel, being in good order, and well and sufficiently equipped and manned, sailed from the port of Charleston, in South Carolina, in the month of July, 1834, bound for the port of Boston aforesaid; and in the prosecution of her voyage, on or about the 5th day of August, 1834, at three o'clock in the afternoon, came in sight of the

of the proceeding. The variations, that have been already given, will be applicable to the present Libel. See *ante*, p. 449.

Light-house of Boston Harbour; that shortly thereafter, the said ship was boarded by John Adams, a Pilot, accustomed to conduct and manage ships in the harbour of Boston aforesaid, and to his charge and guidance, as Pilot, the said Thomas Welsh, Master, immediately committed the navigation and government of the said ship; that the said Pilot and Master consulted together whether it were better to endeavour to get the said ship up the harbour that night, notwithstanding the darkness, or to cast anchor and keep her safely moored till the next morning; that the said Pilot strongly advised the endeavouring to get the said ship up the harbour on the night aforesaid, and urged that it was customary with him and other Pilots of the said port of Boston, to conduct ships up the harbour in the night time, notwithstanding the darkness; that it was accordingly determined to endeavour to get the said ship up the harbour on the night aforesaid; and that powerful lights were placed in different parts of the said ship, and every other possible precaution taken, in order to facilitate the management of the same, and to enable other ships in the harbour to discern the said ship, for a long time before it came near.

Fourth. That very soon after it became dark on the night aforesaid, the wind, which until then had been quite moderate and favorable to sailing up the harbour aforesaid, suddenly began to blow in successive gusts, very strong, stormy, and contrary, so that the said ship Ariel was compelled by means of repeated tacks to beat up against the wind; and that at the same time the night grew so very dark, that it was impossible to discern, without the assistance of a light, objects even when very near.

Fifth. That while the said ship was beating up, as aforesaid, against the wind, notwithstanding the precautions against accident which had been taken, as aforesaid, and also the excellent and seamanlike management by the said Pilot, assisted by the Master and crew, the said ship Ariel

run foul of the ship, which the Respondent understands to have been the said ship Sarah, whereof the present Libellants then were and now are the true and lawful owners, as is alleged in the fourth article of the Libel aforesaid.

Sixth. That the said ship Sarah, at the time of the accident aforesaid, was lying moored straight across the channel of the outer harbour aforesaid, and directly in the path of the said ship Ariel, and that there were no lights visible aboard of the said ship Sarah, which could enable the Pilot, or Master, nor any of the crew of the ship Ariel, then on deck, to discern that the said ship Sarah was so lying across the channel, although they kept a good "look-out" for this purpose; also that neither the Pilot, nor the Master, nor any of the crew of the said ship Ariel, then on deck, heard the said Joseph Connor or any of the crew of the said ship Sarah call to them, as it is alleged they did call in the second article of the Libel aforesaid.

Seventh. That the said Pilot and the Master and crew of the said ship Ariel used the greatest care and skill in the management of the same on the night aforesaid, and took every possible precaution to prevent the occurrence of any accident.

Eighth. That the accident aforesaid was occasioned by the great negligence and want of care of the officers and crew of the said ship Sarah, in the mooring of the said ship in the place where they did, and also in not providing powerful lights on deck, so that the said ship could be discerned at a distance; and that it was not occasioned by any want of care or skill, or by any malice or evil design, on the part of the said Pilot or Master or any of the crew on board the said ship Ariel, as is falsely alleged in the third article of the Libel aforesaid; and that the owner of the said ship Ariel is not, therefore, liable to pay the damages by the Libellants sustained.

Ninth. That all and singular the premises are true, in

verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays that this Honorable Court would be pleased to pronounce against the Libel aforesaid, and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) WILLIAM C. PRESCOTT,
Respondent.

DISTRICT OF MASSACHUSETTS, SS. ———.
Sworn to by the Respondent, before me.
FRANCIS BASSETT, *Clerk.*

No. 5.

Libel on a Bottomry Bond, with two Answers by different Parties.

[The following Libel and the two Answers are founded on the pleadings, a copy of which the Editor has before him, in the case of *The Trial*, which arose in the English Admiralty in 1823, and was afterwards carried by Appeal before the High Court of Delegates. The case has not, however, been reported. The question for the Court, as it appears upon the two answers exhibited by different parties in interest, was, whether the cargo put on board the ship Trial *after* the date of the Bottomry Bond was liable to contribute ratably towards satisfying the Bond. It seems that Lord Stowell decided, that the cargo was liable to contribute, whether put on board *before* or *after* the date of the Bond. But this judgment was afterwards reversed by the High Court of Delegates. Perhaps its reversal, before the publication of the volume of Reports for the period within which it was pronounced, is the reason why we do not find it reported.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.
——— Term, 18—.

To the Hon. JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

The Libel and Complaint of Joshua Kentish, of the Island

of Antigua, merchant, *against the ship Trial, (whereof James Harvey now is or late was Master,) her tackle, apparel, and furniture, and against the cargo lately laden on board the said ship, and the freight due for the transportation of the said cargo, and also against all persons lawfully intervening for their interest therein,*[1] in a cause of bottomry, civil and maritime. And thereupon the said Joshua Kentish alleges and articulately propounds as follows:

First. That the said ship Trial, whilst lying at anchor at Prince Rupert's Bay, in the Island of Dominica, on or about the 26th July, 1825, encountered a severe gale of wind, which dismasted the said ship, carried away all her spars, and drove her on shore; that the said ship, being partly laden with a cargo intended for the port of Boston, and the said James Harvey, the Master, being unable to refit his said ship at the before-mentioned port in the said Island of Dominica, proceeded to the said Island of Antigua to repair his said ship and to procure provisions and other supplies necessary to enable him to return to the said Island of Dominica to complete his said cargo, and afterwards to continue and perform his voyage to the said Port of Boston; that the said James Harvey, being a stranger at Antigua, and being in want of money to pay for the said repairs of his said ship, and fitting her for sea, and furnishing her with provisions and other supplies necessary for the prosecution of his intended voyage, and, having no other means

[1] This would be proper where it was intended to proceed *in rem* against the *ship*, the *cargo*, and the *freight*. Where either of these subjects is not covered by the bottomry bond, upon which the Libel is given in, it must of course be omitted, in this place. If the proceeding be *in personam*, it will be proper to say: "*against A B, of said Boston, merchant, owner of the ship Trial,*" &c. If the proceeding be *in personam* and *in rem*, the two clauses will be united, thus: "*against the ship Trial, (whereof James Harvey now is or late was Master,) &c., &c., and also against A B, of the said Boston, merchant, owner of the said ship,*" &c.

of procuring the same, borrowed of the Libellant the sum of two thousand dollars, upon the Bottomry and Hypothecation of the said ship, cargo, and freight; and that the said sum was advanced and paid accordingly, at and after the rate of eight dollars per cent. for the adventure and maritime risk of the sea, making together the sum of twenty-one hundred and sixty dollars.

Second. That, in consideration of the said advance, and in fulfilment of the agreement of Bottomry and Hypothecation, as aforesaid, he, the said James Harvey, the Master, did, by a certain bond or instrument of Bottomry and Hypothecation, bearing date at the town of St. John, in the Island of Antigua, the 15th of November, 1825, by him signed and duly executed in the presence of two credible witnesses, who have subscribed their names thereto as witnesses of the due execution thereof, bind the said ship, the tackle, apparel, and furniture of the same, and also the freight which then was and should become due for the said voyage from the said port of St. John, to the Island of Dominica aforesaid, and from thence to the said port of Boston, and also the cargo then on board, or thereafter to be put on board the said ship, to pay unto the Libellant, his executors, administrators, and assigns, the sum aforesaid of twenty-one hundred and sixty dollars, within twenty-four hours next after the safe arrival of the said ship at the port of Boston aforesaid, as will appear from the said Bottomry and Hypothecation Bond, a copy of which is hereunto annexed, and which the Libellant prays may be admitted and read as if herein repeated.

Third. That the said sum of twenty-one hundred and sixty dollars was so advanced and paid by the Libellant to the said James Harvey, for the purposes aforesaid, and was necessary therefor, and that the said ship could not have sailed from the said Island of Antigua if the same had not been advanced and paid as aforesaid; that the said ship,

upon being so repaired, proceeded from the said Island of Antigua to the said Island of Dominica, and having there completed her cargo, proceeded therewith to Boston, where she arrived in the month of February last, to wit, on or about ———.

Fourth. That the Libellant has not received the aforesaid sum of twenty-one hundred and sixty dollars, or any part thereof, though the said James Harvey has been frequently requested to pay the same; and that the said Bottomry and Hypothecation Bond remains entirely unsatisfied, to the damage of the Libellant, including interest at the rate of six dollars per cent. per annum, from the time the said Bond became due and payable, the sum of twenty-three hundred and fifty dollars.

Fifth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said ship Trial, her tackle, apparel, and furniture, and against the cargo lately laden on board the said ship and the freight due for the transportation of the said cargo; and that all persons having or pretending to have any right, title, or interest therein may be cited to appear* and to answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, *and that the said ship and freight, and all of the said cargo, were justly and lawfully hypothecated by the said James Harvey, Master*, and

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

to decree such other relief to the Libellant as shall to law and justice appertain; also to condemn *the ship, cargo, and freight aforesaid, and all persons intervening for their interest therein* in costs.[1]

(Signed) JOSHUA KENTISH,
Libellant.

A B, *Proctor.*

DISTRICT OF MASSACHUSETTS, SS.
Sworn to by the Libellant, before me.[2]
JOHN W. DAVIS, *Clerk.*

Bottomry Bond annexed.

ANTIGUA.

To all to whom these presents shall come, I, JAMES HARVEY, Master of the ship or vessel called *The Trial*, belonging to the port of Boston, of the burthen of two hundred and seventy-five tons, or thereabouts, now riding at anchor in the port of St. John, in this Island, Antigua, send Greeting: Whereas, I, the said James Harvey, Master of the aforesaid ship called the Trial, whilst lying at anchor at Prince Rupert's Bay, in the Island of Dominica, on the twenty-sixth day of July last, encountered a severe gale of wind, which dismasted the said vessel, carried away all her spars, and drove her on shore, and being partly laden, and

[1] The conclusion of the Libel will of course vary according to the nature of the proceeding. The variation that has been already given (*ante*, p. 449) will be applicable to the present Libel. The prayer above, that the Court would be pleased to pronounce "*that all of the said cargo was justly and lawfully hypothecated by the said James Harvey, Master*," was introduced with a view to the question as to the liability of the cargo put on board the ship *after* the date of the Bottomry Bond to contribute towards its satisfaction. (*Ante*, p. 469.)

[2] In regard to swearing to the Libel, see *ante*, p. 127.

unable to refit at the last-mentioned port, in consequence of there being neither materials nor conveniences for such purpose, proceeded to this Island (Antigua) to repair my said vessel, and procure provisions and other supplies necessary to enable me to return to the said Island (Dominica) to complete my said cargo, and afterwards to continue and perform the voyage to Boston aforesaid, am at this time necessitated to take up and borrow, upon the Bottom and Adventure of the said ship called the Trial, the sum of two thousand dollars, for the purpose of enabling me to repair the said ship, and fitting her for sea, and furnishing her with provisions and other necessaries for the said voyage, which sum Joshua Kentish, of the said Island (Antigua,) Esquire, hath, at my request, lent unto me, and supplied me with, at the rate of eight dollars per cent., for the adventure and maritime risk of the sea, making together the sum of twenty-one hundred and sixty dollars, being at the rate of $108 for every hundred dollars advanced as aforesaid, during the voyage of the said ship from the said port of St. John, in the Island of Antigua aforesaid, to the Island of Dominica aforesaid, and from thence to Boston aforesaid, and that upon the security of the said ship's Bottom, and the freight to be earned on the said voyage, and *also the cargo now on board, and hereafter to be put on board the said ship.* Now KNOW YE, That I, the said James Harvey, by these presents do, for me, my executors, and administrators, covenant and grant to and with the said Joshua Kentish, that the said ship shall, with the first fair wind after the date of these presents, set sail and depart for the Island of Dominica aforesaid, there to complete her cargo or lading, and after that to Boston aforesaid, there to finish the voyage aforesaid. And I, the said James Harvey, in consideration of the sum of two thousand dollars, to me in hand paid by the said Joshua Kentish, at and before the sealing and delivery of these presents, do hereby bind myself, my heirs, execu-

ters, and administrators, my goods and chattels, and particularly mortgage and hypothecate the said ship Trial, the tackle and apparel of the same, and also the freight of the said ship, which is or shall become due for the said voyage from the port of St. John, in this Island of Antigua aforesaid, to the Island of Dominica aforesaid, and from thence to the port of Boston aforesaid, and *also the cargo now on board, or hereafter to be put on board, the said ship*, to pay unto the said Joshua Kentish, his executors, administrators, or assigns, the sum of twenty-one hundred and sixty dollars, within twenty-four hours after the safe arrival of the said ship at the port of Boston aforesaid. And I, the said James Harvey, do for me, my executors and administrators, covenant and grant to and with the said Joshua Kentish, his executors and administrators, by these presents, that I, the said James Harvey, at the time of sealing and delivering of these presents, am the true and lawful master of the said ship, and have power and authority to mortgage and hypothecate the said ship, with her freight, and *likewise the cargo now on board, and hereafter to be put on board, the said ship*, on Bottomry as aforesaid; and that the said ship, with her freight and *also her said cargo*, shall at all times after the said voyage be liable and chargeable for the payment of the said sum of twenty-one hundred and sixty dollars, according to the true intent and meaning of these presents. And, lastly, it is hereby declared and agreed, by and between the said parties to these presents, that, in case the said ship shall be lost, miscarry, or be cast away, before the arrival at the said port of Boston aforesaid, from the said intended voyage, that then the payment of the said sum of two thousand dollars, and also one hundred and sixty dollars for maritime risk and adventure of the sea, making together the sum of twenty-one hundred and sixty dollars secured by this Bottomry Bond, shall not be demanded or be recoverable by the said Joshua Kentish, his executors, adminis-

trators, or assigns, but shall cease and determine, and the loss thereof be wholly borne and sustained by the said Joshua Kentish, his executors and administrators; and that then, and from thenceforth, every act, matter, and thing, herein mentioned on the part and behalf of the said James Harvey, shall be void, any thing herein contained to the contrary thereof notwithstanding.

IN WITNESS whereof, I, the said James Harvey, have hereunto set my hand and seal (and to one other part of the same tenor and date, one of which being paid, the other to be null and void,) at the town of St. John, in the Island of Antigua aforesaid, this fifteenth day of November, in the year of our Lord one thousand eight hundred and twenty-five. JAMES HARVEY, (L. S.)

Signed, sealed, and delivered in the presence of

CHARLES ESTE,
LEWIS F. BELLOT.

ANTIGUA.

I, HUGH EDWARDS, of the town of Saint John, in the said Island (Antigua,) Notary Public by Royal Authority, duly admitted and sworn at Doctors' Commons, London, do hereby certify, make known, and declare to all to whom it may concern, that the foregoing and within Bottomry Bond was duly signed, sealed, and delivered by "James Harvey," therein named, in my presence, and in the presence of "Charles Este" and "Lewis F. Bellot." To the due execution thereof, an act being requested, I have granted the same under my notarial form and seal of office, to serve and avail as occasion shall or may require.

Done and passed at the said town of St. John, in the Island of Antigua aforesaid, this fifteenth day of November, in the year of our Lord one thousand eight hundred and twenty-five, to serve and avail as occasion shall or may require.

(L. S.) HUGH EDWARDS, *Notary Public.*

Claim and Answer by the Owners of Cargo laden on board before the Bottomry Bond.[1]

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now John Blandy, of the Island of Madeira, merchant, John Oliveira and John Kruger, of London, merchants and copartners, under the firm of Oliveira & Kruger, (the two last by their lawful attorney, James Pierpont,) Richard Symonds, of New York, doing business, as a merchant, under the name of Richard Symonds and Company, and also William Coles, of Boston, in the District aforesaid, *intervening for their several and respective interests in the cargo of the ship Trial,* appear before this Honorable Court, and for answer to the Libel and Complaint of Joshua Kentish of the Island of Antigua, merchant, against the said ship Trial, her tackle, apparel, and furniture, and against the cargo lately laden on board the said ship, and against the freight due for the transportation of the said cargo, and also against all persons lawfully intervening for their interest therein, allege and articulately propound as follows:

First. That John Blandy, one of the Respondents, is the owner of twenty hogsheads of Madeira wine; that John Oliveira and John Kruger, Respondents, are the owners of five pipes and ten hogsheads of Madeira wine, and the consignees of three pipes and four hogsheads of Madeira wine;

[1] In the case of the ship *Trial*, upon the facts of which these pleadings have been formed, (see *ante*, p. 469,) no answer was put in by the owners of the ship and freight, no defence existing of which they could avail themselves. A question, however, arose as between the owners of the cargo laden on board *before* and *after* the Bottomry Bond, which is distinctly raised by the respective answers which appear above.

that Richard Symonds, one of the Respondents, is owner of two pipes and six hogsheads of Madeira wine; and that William Coles, another of the Respondents, is the owner of forty-one hogsheads of sugar marked I B C X, and also the consignee of twenty-four tierces of sugar, marked M, all of which goods and merchandise were part of the cargo lately laden on board the said ship Trial, and against which the said Libel has been exhibited.

Second. That the several matters in the several articles of the said Libel alleged are not denied by the Respondents, but are on the other hand by them admitted to be true.

Third. And the Respondents further allege and propound, that all of the aforesaid goods, so as aforesaid by them respectively claimed, were laden on board the said ship prior to the date of the Bottomry Bond sued upon in this cause; and, while they admit that the said goods are pledged and liable to the payment of the Bottomry Bond aforesaid, yet they further propound, that, in equity, and according to the principles of Courts of Admiralty and of this Honorable Court, the said ship and freight ought to be first applied towards the payment of and in discharge of the said Bottomry Bond; and that the goods aforesaid, being part of the cargo laden on board the said ship, ought not to be applied thereto, until the proceeds of the said ship and freight have been exhausted for the purposes aforesaid.[1]

Fourth. That all and singular the premises are true; in verification whereof, if denied, the Respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Respondents pray this Honorable Court to marshal and arrange the sums and proportions for which they are respectively liable, taken in conjunction with the

[1] Where a Bottomry Bond is given on the ship and cargo, a Court of Admiralty will marshal the assets in favor of the shippers of the cargo, so as to bring their property last into contribution.—*Ship Packet*, 3 Mason R. 264.

other owners of the cargo, after the proceeds of the said ship and freight shall have been so applied as aforesaid, and that their interests may be secured, and otherwise right and justice be administered in the premises.

(Signed) JOHN BLANDY,
JOHN OLIVEIRA,
by his Attorney, JAMES PIERPONT,
JOHN KRUGER,
by his Attorney, JAMES PIERPONT,
RICHARD SYMONDS,
WILLIAM COLES,
the Respondents.

C D, *Proctor.*

MASSACHUSETTS, SS. ———

Sworn to by the said John Blandy, Richard Symonds, and William Coles, and also by James Pierpont, attorney of John Oliveira and John Kruger, according to his knowledge and belief, before me.[1] JOHN W. DAVIS, *Clerk.*

Claim and Answer by the Owners of Cargo laden on board after the Bottomry Bond.[2]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now John Roberts of Boston in the said District, mer-

[1] An agent or attorney, who makes a claim or puts in an answer, will swear according to his knowledge and belief.

[2] In this answer the Libel may be said to be contested negatively, as to

chant, William Nicholson of New York, merchant, and John Fraser and William Neilson, of London, merchants and copartners under the name of Fraser and Neilson, (the two last by their lawful Attorney, James C. Hopkins,) *intervening for their several and respective interests in the cargo of the ship Trial*, appear before this Honorable Court, and for Answer to the Libel and Complaint of Joshua Kentish, of the Island of Antigua, merchant, against the said ship Trial, her tackle, apparel, and furniture, and against the cargo lately laden on board the said ship, and against the freight due for the transportation of the said cargo, and also against any persons lawfully intervening for their interest therein, allege and articulately propound as follows:

First. That John Roberts, one of the Respondents, is the owner of ten hogsheads of sugar marked $\frac{Q\ M}{P}$ 51, and five puncheons of rum marked B.C; that William Nicholson, one of the Respondents, is the consignee of twenty-five hogsheads of sugar marked I L; and that John Fraser and William Neilson, Respondents, are the owners of twelve puncheons of molasses marked I B D; all of which goods and merchandise were part of the cargo lately laden on board the said ship Trial, and against which the said Libel has been exhibited.

Second. That the several matters in the several articles of the said Libel are not denied by the Respondents, but are on the other hand by them admitted to be true.

Third. And the Respondents further allege and propound,

the liability of the cargo laden on board after the Bottomry Bond. If, however, it had appeared on the face of the Libel, that the property of the Respondents was in this predicament, they might have filed an exceptive answer, in which case the Libel might be said to be contested affirmatively, as on a general demurrer at Common Law; the Respondents not denying the facts, but insisting that the Libellant has not a legal case upon his own statement. —See *ante*, p. 182.

that all the goods aforesaid were respectively shipped at the Island of Dominica, where the said ship Trial returned for the purpose of completing her cargo, as is alleged in the *third* article of the said Libel, subsequently to the date and execution of the Bottomry Bond sued upon in this cause, to wit, in the month of December, 1825.

Fourth. That by reason of the premises in the last article stated, the goods aforesaid were not justly or legally hypothecated by James Harvey, the Master of the said ship Trial, to the Libellant, or his executors, administrators, or assigns; and that the same are not subject or liable to the payment of the sum of twenty-one hundred and sixty dollars secured by the said Bottomry Bond, or of any part thereof.

Fifth. That all and singular the premises are true; in verification whereof, if denied, the Respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Respondents pray this Honorable Court to pronounce, that the said goods respectively were not justly and legally hypothecated, and that they may be dismissed from this suit, so far as regards the said goods, being part of the cargo of the said ship laden subsequently to the date of the said Bottomry Bond, *that the same may be restored to them*, also that the costs by them sustained may be decreed to them, and that otherwise right and justice may be administered in the premises.[1]

(Signed) JOHN ROBERTS,
WILLIAM NICHOLSON,
JOHN FRASER,
by his Attorney, J. C. HOPKINS,
WILLIAM NEILSON,
by his Attorney, J. C. HOPKINS,
The Respondents.

E F, *Proctor.*

[1] In the above Claim and Answer, a clause praying restitution of the goods claimed is inserted. This would be proper in all cases, and particu-

MASSACHUSETTS, ss. ———

Sworn to by the said John Roberts and William Nicholson, and also by J. C. Hopkins, attorney of John Fraser and William Neilson, according to his knowledge and belief.[1]

JOHN W. DAVIS, *Clerk.*

No. 6.

Libel on a Bottomry Bond, with a Claim and Answer.

[The following Libel is against both the ship and the owner. In the Answer, the owner alleges that the Bottomry Bond is void, as against the ship and himself, because the Master, at the time of its execution, had funds of the owner in his hands, and also because the owner had a personal credit at the place where it was given.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District aforesaid.*

THE Libel and Complaint of James Perkins, of Cadiz, in the kingdom of Spain, merchant, *against the ship Marcellus (whereof Joseph Jenkins now is or late was Master), her tackle, apparel and furniture, and against William Perry of Boston, in the said District, merchant, owner of the said ship, and also against all persons lawfully intervening for their interest in the said ship,*[2] in a

larly where the property, at the time the claim is given in, is under arrest, and not bailed. The prayer for general relief, however, and to pronounce against the Libel, would embrace this special prayer; though it would be better to insert it in cases where the property is actually under arrest.

[1] See *ante*, p. 479.

[2] With regard to the variations of this commencement in order to suit different cases, see *ante*, pp. 447, 462.

cause of Bottomry, civil and maritime. And thereupon the said James Perkins alleges and articulately propounds as follows;

First. That in the year 1832, the said ship Marcellus, of the burthen of about 400 tons, (whereof the said Joseph Jenkins was then Master,) proceeded on a voyage from the port of Boston, in the District aforesaid, to the port of Liverpool, in the kingdom of Great Britain, and from thence to the port of Cadiz, in the kingdom of Spain, intending to return to the port of Boston aforesaid; and that the said Joseph Jenkins, during all the said voyage, had the sole command of the said ship, as Master.

Second. That in the month of July, 1833, the said ship Marcellus, then lying in the said port of Cadiz, was in great need of reparations, provisions, and other necessaries, to render her fit and capable of proceeding from thence on her then intended voyage to the port of Boston aforesaid; and, the said William Perry, the owner, and Joseph Jenkins, the Master, not then having any funds or credit there, the Libellant did, at the request of the said Joseph Jenkins, the Master, advance and lend to him the said Joseph Jenkins the sum of three thousand dollars, on the Bottomry and Hypothecation of the said ship on the adventure and risk thereof as hereinafter mentioned, and at the rate of twenty per cent. maritime interest, for the repairing, victualling, and manning of the same, in order to enable her to proceed from thence to the said port of Boston; and the said Joseph Jenkins did really and truly expend the said sum for the purposes aforesaid; and the said ship could not possibly have proceeded with safety upon her said voyage without such repairs and other necessary expenses attending the refitting her for the voyage aforesaid.

Third. That on or about the 20th day of July, 1833, the said Joseph Jenkins, Master as aforesaid, in pursuance of the agreement of Bottomry and Hypothecation as aforesaid,

in order to secure the repayment of the said sum of three thousand dollars so lent and advanced by the said Libellant for the purposes mentioned in the next preceding article, and also the payment of six hundred dollars, the amount of the maritime interest according to the rate mentioned in the next preceding article, did, in the behalf of himself and the owner of the said ship, execute a certain Bottomry or Hypothecation Bond, whereby, among other things, he bound himself and the said ship Marcellus, with her freight, tackle, apparel, and furniture, to pay to the said Libellant, his executors, administrators or assigns, the sum of three thousand and six hundred dollars, or its value, within ten days after the safe arrival of the said ship in the said port of Boston, on and from her then intended voyage from the port of Cadiz aforesaid, and did covenant and agree that the said ship, her freight, tackle, apparel, and furniture, should at all times after the said voyage be liable for the payment of the said sum; and it was also declared by the said Bond, that, in case the said ship should be lost or cast away before her arrival in the said port of Boston, the payment of the said sum should not be demanded, but should cease and determine, and the loss thereby be only borne and sustained by the Libellant, and his heirs, executors, administrators, or assigns, all of which by the said Hypothecation Bond, a copy of which is hereunto annexed, and marked with the letter A, whereto the Libellant craves leave to refer, does fully appear.

Fourth. That the said ship sailed on the said voyage and arrived safe at the port of Boston from the port of Cadiz aforesaid, on or about the 15th day of September, 1833, and then and there delivered her cargo; and that, after the expiration of ten days from her said arrival, the Bond was on behalf of the Libellant tendered for payment to the said Joseph Jenkins, the Master, and also to the said William Perry, the owner of the said ship, but that both of them refused

to discharge the same, and still refuse so to do, to the damage of the Libellant the full sum of ———.

Fifth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue *against the said ship, her tackle, apparel, and furniture, wheresoever the same shall be found, and also against the said William Perry, owner of the same, and that the said William Perry, and all persons having or pretending to have any right, title or interest in the said ship, may be cited to appear, and* to answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and for such other relief to the Libellant as shall to law and justice appertain, and also to condemn *the said ship, her tackle, apparel, and furniture, and the said William Perry and all persons intervening for their interest in the said ship,*[2] in costs.

(Signed) JAMES PERKINS,
Libellant.

A B, *Proctor.*

MASSACHUSETTS, ss. ———, 18—.
Sworn to by the Libellant before me.
FRANCIS BASSETT, *Clerk.*

[1] In regard to requiring the answer to be under oath, see *ante*, p. 124.

[2] The conclusion of the Libel will of course vary according to the nature of the proceeding. The variation that has been already given, (*ante*, p. 449,) will be applicable to the present Libel.

Bottomry Bond Annexed.

[In this case the Bottomry Bond is omitted.]

Claim and Answer.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now William Perry, of Boston, in the said District, merchant, *intervening for himself and for his interest in the ship Marcellus*, appears before this Honorable Court, and for Answer to the Libel and Complaint of James Perkins, of Cadiz, in the kingdom of Spain, *against the said ship, and against him the said William Perry, and against all persons intervening for their interest in the said ship*, alleges and articulately propounds as follows:[1]

First. That the Respondent is the true and lawful owner of the said ship Marcellus, a vessel of four hundred tons or thereabouts, and now lying in the port of Boston, in the District aforesaid.

Second. That in the year 1832 the said ship proceeded on a voyage from the port of Boston aforesaid, to the port of Liverpool, in the kingdom of Great Britain, and from thence to the port of Cadiz, in the kingdom of Spain, intending to return to the port of Boston aforesaid; and that Joseph Jenkins was the Master of the same during all of the said voyage, as is alleged in the first article of the Libel aforesaid.

[1] For the proper variations of this commencement to meet other cases, see *ante*, p. 450.

Third. And the Respondent admits that the said ship, during the month of July, 1833, being in the said port of Cadiz, was in need of reparations, provisions, and other necessaries, to render her capable of proceeding from thence on her then intended voyage to the port of Boston aforesaid; and that the Libellant did advance to the said Joseph Jenkins the sum of three thousand dollars, at the rate of 20 per cent. maritime interest, on the adventure of the said ship, in order to relieve the necessities of the said ship; and that the said Joseph Jenkins did expend the said sum for the purposes aforesaid, as is alleged in the second article of the Libel aforesaid.

Fourth. And the Respondent also admits, that the said Joseph Jenkins, on or about the 20th day of July, 1833, executed the Bottomry Bond which is pleaded in the third article of the Libel aforesaid, in order to secure the repayment of the said sum of three thousand dollars, and also the sum of six hundred dollars, being the amount of maritime interest thereon; that the said ship arrived safe at the port of Boston aforesaid; and that the said Bottomry Bond was tendered for payment, and rejected, as is alleged in the fourth article of the Libel aforesaid.

Fifth. But the Respondent further alleges and propounds, that it is falsely alleged in the second article of the Libel aforesaid, that he had not funds or credit in the said port of Cadiz at the time aforesaid; for that the truth is, that Joseph Jenkins, the Master of the said ship, while at the port of Cadiz aforesaid, and at the time the money aforesaid was lent and advanced, had in his possession funds belonging to the Respondent to an amount amply sufficient for all the necessities of the said ship; and also that the Respondent had a personal credit in the said port of Cadiz, he being well known there, and having many commercial correspondents there, upon which credit the means necessary to relieve the necessities of the said ship, as aforesaid, could

have been raised; all of which the said Joseph Jenkins well knew at the time when he borrowed the money aforesaid, and executed the Bottomry Bond propounded in the third article of the Libel aforesaid.

Sixth. That, in consideration of the premises, the said Joseph Jenkins was not authorized, and had no legal right to execute the Bond aforesaid; and that accordingly the Bond, so executed, is not good or valid as against the said ship or the Respondent.

Seventh. That all and singular the premises are true; in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays that this Honorable Court would be pleased to pronounce against the Libel aforesaid, *and to decree a restoration of the said ship to the Respondent*,[1] and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) WILLIAM PERRY,
Respondent.

C D, *Proctor.*

DISTRICT OF MASSACHUSETTS, SS. ———.

Sworn to by the Respondent before me.

FRANCIS BASSETT, *Clerk.*

No. 7.

Libel by a dissentient Part-owner of a Ship, in order to procure Possession.

[In the following Libel, the facts of which have been drawn from the case of *Williams* v. *Blight*, (2 Peters Ad. R. 288,) the part-owner, applying to the Court, is supposed to have a majority of interest in the ship, so that he is

[1] In regard to the insertion of this clause, see *note*, p. 481.

entitled to claim possession. If his interest were a minority, his only remedy would be to obtain security from those seeking to employ the ship; and also, if his interest was a moiety, the part-owner may obtain security from those seeking to employ the ship, or, where there is a disagreement as to her employment, he may procure a decree for her sale.—*The Brig Seneca*, 3 Kent's Com. 154. See the next precedent.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Samuel S. Cooper, of Boston in the District aforesaid, and owner of three quarter parts of the Brigantine Amelia (whereof William Jenks now is or late was Master), against the said Brigantine Amelia, her tackle, apparel, and furniture, and against Peter Blight of Boston aforesaid, merchant, and owner of one quarter part of the said Brigantine, and also all persons lawfully intervening for their interest in the said Brigantine, in a cause of possession, civil and maritime. And thereupon the said Samuel S. Cooper alleges and articulately propounds as follows:

First. That the Libellant is the true and lawful owner of three quarter parts of the said Brigantine Amelia, of the burthen of about three hundred tons, and now lying in the port of Boston aforesaid.

Second. That the Libellant is now, and has been for a long time, desirous of sending the said Brigantine on a voyage to St. Sebastian in Spain, and from St. Sebastian back to Philadelphia; but that the said Peter Blight, owner of the remaining quarter part of the said Brigantine, has refused, though repeatedly applied to in this regard, to join in the voyage aforesaid, or to suffer the said Brigantine to sail on the account of the Libellant on the voyage aforesaid.

Third. That all and singular the premises are true, and

within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of Law, according to the course of Courts of Admiralty and of this Honorable Court, may issue against the said Brigantine Amelia, her tackle, apparel, and furniture, wheresoever the same shall be found, and that the said Peter Blight, owner of the quarter part as aforesaid, and all persons having or pretending to have any right, title, or interest therein, may be cited to appear before this Honorable Court, and to show cause, why the possession of the said Brigantine should not be delivered to the Libellant, as having the majority of interest therein; and that this Honorable Court would be pleased to decree the possession of the said Brigantine to be delivered to the Libellant, and to administer such other relief as shall to law and justice appertain, and also to condemn the said Peter Blight and all persons intervening for their interest in the said Brigantine in costs.

(Signed) SAMUEL S. COOPER,
Libellant.

A B, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the Libellant before me.[1]

FRANCIS BASSETT, *Clerk.*

[1] This libel must be sworn to in order to found the application for the warrant to arrest the ship. In the practice of the English Admiralty, if the arrest is at the instance of those concerned in the moiety *only* of the vessel (see the next precedent), the action may be bailed and the ship thereby released from the arrest, the bail being of course answerable for obedience, on the part of the Master, to whatever may be the final decree of the Court. But, where the arrest is at the instance of those concerned in the vessel to a greater extent than a moiety, the ship is kept under arrest during the proceedings, and bail to the action, in order to the release of the vessel, is not allowed to be given.

Answer.

[The following Answer discloses an assignment by the Respondent of his alleged interest in the said ship to trustees for the benefit of his creditors, so that he no longer has any control over it. The trustees, in this case, should intervene for their interest in the said ship, and pray for security from the party seeking to employ her.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Hon. JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now Peter Blight, of Boston, in the District aforesaid, merchant, appears before this Honorable Court, and for Answer to the Libel and Complaint of Samuel S. Cooper, of Boston aforesaid, against the Brigantine Amelia, and against him the said Peter Blight, and also against all persons lawfully intervening for their interest in the said Brigantine, alleges and articulately propounds as follows:

First. That the Libellant is the true and lawful owner of three quarter parts of the said Brigantine Amelia, as in the first article of the said Libel is alleged.

Second. That the Respondent was the owner of a quarter part of the said Brigantine from some time in the month of April, 1832, until the 6th day of January, 1834, on which last day, by a deed of indenture, he assigned all his property, real and personal, of whatsoever name or nature, and wheresoever situated, to George Blight and William Cole, in trust for the benefit of his creditors; and that he is not now, nor was he, at the time of filing the said Libel, the owner of a quarter part of the said Brigantine; but that the said quarter part has belonged to the trustees aforesaid, and could not be employed without their consent, ever since the date of the said assignment, and long before the time of filing the said Libel.

Third. That the Respondent refused to join in the voyage from Philadelphia to St. Sebastian and from St. Sebastian back to Philadelphia, as is alleged in the second article of the said Libel, for reasons alleged in the next preceding article.

Fourth. That all and singular the premises are true; in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays that this Honorable Court would be pleased to pronounce against the Libel aforesaid, and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) PETER BLIGHT,
Respondent.

C D, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the Respondent before me.

FRANCIS BASSETT, *Clerk.*

No. 8.

Libel by Dissentient Part-owners of a Ship, in order to obtain Security, with a Stipulation thereupon.

[In the following Libel the dissentient part-owners are supposed to have but a *moiety* of the ship, so that their remedy is to procure security from those seeking to employ her, or a decree for her sale. The first course only would be open to the owners of less than a moiety. See *ante*, p. 488-9.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of William Pinkney and Leonard C. Russell, of Boston, in the District aforesaid, merchants, and owners of one moiety of the Brig Harriet, (whereof James Fowle, of Boston aforesaid, now is or late was Master,) against the Brig Harriet, her tackle, apparel, and furniture, and against the said James Fowle, and also against Thomas French, of Boston aforesaid, merchant, and owner of one moiety of the said brig, and against all persons lawfully intervening for their interest in the said brig, in a cause of possession, civil and maritime. And thereupon the said William Pinkney and Leonard C. Russell allege and articulately propound as follows:

First. That the Libellants are the true and lawful owners of one moiety of the said brig Harriet, of the burthen of three hundred and fifty tons, or thereabouts, which is now lying at the port of Boston, and that the said moiety is worth the sum of three thousand dollars.

Second. That the said Thomas French, owner of another moiety of the said brig, has caused to be laden on board the said brig a cargo of staves, hogsheads of molasses, and New England rum, to be carried therein to Smyrna, a foreign and distant port, under the government of the Ottoman Porte, commonly called the Sultan of Turkey, and is about to cause the said ship to be cleared at the Custom-House for the said port; that he has constituted the said James Fowle Master of the said ship for the voyage aforesaid, and that the said James Fowle is now making great haste and preparation for the entering upon and performance of

the said voyage, and sailing from the port of Boston aforesaid.

Third. That the said voyage was planned, and the said cargo taken on board the said ship, and the said James Fowle constituted Master of the same for the voyage aforesaid, without consulting the Libellants, and contrary to their express desires often communicated to the said Thomas French, part-owner, as aforesaid; and that the Libellants now object to, and dissent from, the said employment of the said ship on and for the voyage aforesaid.

Fourth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Libellants pray, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue against the said Brig Harriet, her tackle, apparel, and furniture, wheresoever the same shall be found, and that the said James Fowle, Master as aforesaid, and Thomas French, owner of one moiety as aforesaid, and all persons having or pretending to have any right, title, or interest in the said brig, may be cited to appear before this Honorable Court, and to show cause why the said James Fowle should not be restrained from proceeding to sea with the said brig, until good and sufficient security shall be given in this Court, to the amount of the value of the moiety of the Libellants therein, for the return of the said brig to the said port of Boston, to which she belongs; and that this Honorable Court would be pleased to pronounce that such security shall be given or the possession of the said brig be delivered to the Libellants, and to administer such other relief as shall to law and justice appertain, and also to condemn the said James Fowle and Thomas

French, and all persons intervening for their interest in the said brig, in costs.[1]

(Signed) WILLIAM PINKNEY,
LEONARD C. RUSSELL,
Libellants.

A B, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the Libellants, before me.[2]

FRANCIS BASSETT, *Clerk.*

Stipulation by a Part-owner and Master of a Ship with Sureties, on sending the Ship to Sea.

[The following is the form of a Stipulation with sureties, to be entered into in open Court, like the recognizance at Common Law. Instead of this, a bond duly executed may be given, and, upon either security being entered into, the ship will be released. But, it seems, the best course would be to take an Admiralty stipulation. (*The Alligator*, 1 Gall. R. 149.) Doubts were originally entertained, whether the practice of taking stipulations in causes like the present were within the powers of the British Admiralty; but the practice has survived those doubts, and has been formally recognised by the Courts of Common Law. (*The Apollo*, 1 Hagg. R. 311.) The Court compels the party to find the security; and it likewise, in the event of a failure of the ship to return according to the undertaking, compels the party to pay the sum stipulated. This is effected by a monition, issued at the instance of the former Libellant, who should appear before the Court with another Libel against his co-owners and their sureties, requiring them to pay into the Registry for his use, the value of his part of the ship, or to show cause to the contrary. The Libel for this object should be in the common form, and should state the co-ownership, the dissent from the proposed voyage, the stipulation, the voyage undertaken, the failure of the ship to return, and the consequent forfeiture of the stipulated sum; concluding with a prayer for the monition above-mentioned, and for other relief.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

On this 10th day of April, 1836, James Fowle, of Bos-

[1] If a sale of the ship be desired, a prayer to this effect must be inserted.

[2] This Libel must be sworn to in order to found the application for the warrant to arrest the ship. See note, *ante*, p. 490.

ton in the District aforesaid, Master of the Brig Harriet, and Thomas French of Boston aforesaid, merchant, appear in Court and produce for sureties Josiah Culmer and George Goodwin Hope, both of Boston aforesaid, merchants; and the said James Fowle and Thomas French as principals, and the said Josiah Culmer and George Goodwin Hope as sureties, submitting themselves to the jurisdiction of this Court, do bind themselves, their heirs, executors and administrators, in the sum of *six thousand dollars*, being double the appraised value of one moiety of the said brig, unto William Pinkney and Leonard C. Russell, both of Boston aforesaid, merchants, owners of the said moiety of the said brig, for the safe return of the said brig to the port of Boston, being the port to which the same belongs,[1] or to pay to them the amount of the said moiety of the said William Pinkney and Leonard C. Russell; and unless they shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum aforesaid.

No. 9.

Libel to obtain Possession of a Ship wrongfully withheld from the Owners, with an Answer.

[The following Libel and Answer have been drawn to meet the facts which appear in the report of the case of *The Schooner Tilton*, (5 Mason R.

[1] It seems questionable, in England, whether the parties can be compelled to give bond for any thing more than the return of the vessel to the country to which she belongs; since, when a vessel is within the protection of the country, she is in her general home, and the parties are restored, as to any legal remedies, to the situation in which they stood before the departure of the vessel. In the precedent of a stipulation or bond, in the Appendix of Abbott on Shipping, 497, the terms are general, "to return," without mention of a particular port. The more general form of bonds now used in

465.) The Libel seeks a restitution of the ship alleged to be wrongfully withheld from the owners, and the Answer sets up a title derived under a sale of the ship by a wreck-commissioner. The question involved in the pleadings is, therefore, one of title. It may be questionable, if the English Admiralty would exercise jurisdiction in a case like the present, (see *The Partridge*, 1 Hagg. Rep. 81,) since, according to the ill-defined distinction between *possessory* and *petitory* suits, this would seem to fall under the latter denomination, over which the jurisdiction of the English Admiralty has not latterly been extended; but it does not appear that this distinction has affected the jurisdiction of the Courts of the United States.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of George W. Otis and Jonathan Thaxter, both of Boston in the District aforesaid, merchants, against the schooner Tilton, (whereof John Schenck of the said Boston now is or late was Master,) her tackle, apparel, and furniture, and against the said John Schenck, Master as aforesaid, and William McCabe and Theodore Smith, both of Boston aforesaid, merchants, and also against all other persons lawfully intervening for their interest in the said schooner, in a cause of possession, civil and maritime. And thereupon the said George W. Otis and Jonathan Thaxter allege and articulately propound as follows:

First. That the Libellants are the true and lawful owners of three quarter parts of the said Schooner Tilton, a vessel of about two hundred tons, now lying in the port of Boston, and for a long time had the possession and employment

England is as in the text above. (See *The Margaret*, 2 Hagg. R. 278.) And this form would seem to be particularly proper in the United States, where the different States are regarded as *foreign* in respect to each other, so that a ship belonging to one State could not be said to be in her general home, unless she was in a port of that State.

thereof as such owners, and ought now to have the full possession thereof.

Second. That the possession of the said schooner is now, and for a long time has been, wrongfully withheld from the Libellants by the said John Schenck, William McCabe, and Theodore Smith, on an alleged ground of title to the possession, which is entirely false and invalid, the said title being referred to a pretended sale by the said Samuel Tilton, Master as aforesaid, which sale was wholly unauthorized, without any necessity, and without any legal survey or condemnation of the said ship, and in violation of the duty of the said Samuel Tilton as Master, and in fraud of the Libellant, so that the same is utterly void.[1]

Third. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Libellants pray that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue against the said Schooner Tilton, her tackle, apparel, and furniture, wheresoever the same may be found, and that the said John Schenck, William McCabe, and Theodore Smith, and all other persons, having or pretending to have any right, title, or interest in the said schooner, may be cited to appear before this Honorable Court, and to show cause, why possession of the said

[1] This Libel would be sufficient without mentioning the pretended sale, to which it alleges the title of the possession to the ship is referred. If, however, the sale should not be mentioned, and alleged to be invalid, and it should be afterwards set up in the answer, the proctor for the Libellant will either file a special replication traversing it, or pray leave to amend his Libel, so as to allege it to be invalid. The practice of amending the pleadings, as in Chancery, instead of resorting to the protracted altercations of *Replications, Rejoinders, &c.*, is much encouraged by a distinguished Admiralty Judge in the United States.

schooner should not be delivered to the Libellants, as having the majority of interest therein, and full title to the sole possession thereof against the said John Schenck, William McCabe, and Theodore Smith; and that this Honorable Court would be pleased to decree the possession of the said schooner to be delivered to the Libellants, and to administer such other relief in the premises as shall to law and justice appertain, and also to condemn the said John Schenck, William McCabe, and Theodore Smith, and all persons intervening for their interest in the said schooner, in costs.

(Signed) GEORGE W. OTIS,
JONATHAN THAXTER,
Libellants.

A B, *Proctor.*

MASSACHUSETTS, SS. ———.
Sworn to by the Libellants before me.[1]
JOHN W. DAVIS, *Clerk.*

Answer.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.
——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now John Schenck, Master of the Schooner Tilton, William McCabe and Theodore Smith, merchants, all of Boston in the District aforesaid, appear before this Honorable Court, and for answer to the Libel and Complaint of George W. Otis and Jonathan Thaxter, both of Boston aforesaid, merchants, against the Schooner Tilton, her tackle, apparel, and furniture, and against the said John

[1] In regard to swearing to the Libel, see *ante*, p. 127.

Schenck, William McCabe, and Theodore Smith, and also against all persons intervening for their interest in the said schooner, allege and articulately propound as follows:

First. That the Respondents are the true and lawful owners of the said Schooner Tilton; to wit, that the said William McCabe and Theodore Smith are the owners of three quarter parts of the said schooner, and the said John Schenck of one quarter part thereof; and the Libellants are not the true and lawful owners of the said schooner, as is alleged in the first article of the said Libel, though the Respondents admit, that the Libellants were the owners of three quarter parts of the said schooner until the sale hereinafter pleaded.

Second. That the possession of the said Schooner is not now, and has not been, wrongfully withheld by the Respondents from the Libellants on a ground of title to the possession which is false and invalid, and which is referred to a pretended sale by the said Samuel Tilton, which was utterly void, as is falsely alleged in the second article of the Libel aforesaid; but that the Respondents have kept and now keep possession of the said schooner, because they had, and now have, a full and clear right to the possession thereof, which right was derived from a good and valid sale to them by the said Samuel Tilton, as will fully appear from the particulars hereinafter alleged.

Third. That the said schooner sailed from the port of New York on the 18th day of May, 1828, in ballast, bound to the port of Conwayborough, in the State of South Carolina; three quarter parts of the said Schooner being owned at that time by the Libellants, and the remaining quarter part by the said Samuel Tilton, the Master; That on the 19th day of the month last mentioned, during the night-time, the said schooner was stranded upon the beach near the banks of Chickamacomico, on the coast of North Carolina; That, on the morning next after the stranding aforesaid, the said

Samuel Tilton, as Master, made a protest before a notary public, and applied to James O'Neil, a wreck-master at the place where the said schooner then was, for advice and assistance, who, at the request of the said Samuel Tilton, examined the situation of the said schooner, and thereupon advised a sale thereof, on account of the imminent peril and danger of a total loss thereof from her stranding as aforesaid; That the said Samuel Tilton thereupon advertised the said schooner to be sold on the 31st day of the same month; That, at the request of the said Samuel Tilton, a survey of the said schooner was had by three persons appointed by the notary public aforesaid; That these three persons, on the day of the sale of the said schooner, according to the advertisement aforesaid, and a few hours previous to the said sale, reported that the said schooner ought to be sold, where she then lay, for the benefit of all concerned; that the said schooner was accordingly sold at public auction on the 31st day of the said month, according to the advertisement aforesaid, by the said James O'Neil, and was bid off by one Pharaoh Farrow, for the sum of one hundred and ninety-six dollars and fifty cents; That the said schooner was afterwards floated by persons employed by the said Pharaoh Farrow, and taken to a neighbouring harbour, where she lay for the space of one month or thereabouts, when she was taken to the port of Washington, in North Carolina; That at the said port, on the 21st day of July next succeeding, the said Pharaoh Farrow conveyed, by a bill of sale, one half part of the said schooner to the said Samuel Tilton, and one quarter part of the same to the said James O'Neil; that the said schooner was duly registered at the Custom-House at the port of ——— as the property of the said Pharaoh Farrow, Samuel Tilton, and James O'Neil; That on the day last aforesaid the said Pharaoh Farrow and James O'Neil conveyed, by a bill of sale, one half part of the said schooner to the said William McCabe and Theodore Smith,

in consideration of the sum of four hundred dollars paid to each of them, the said Farrow and O'Neil, by the said McCabe and Smith; That on the 12th day of August next succeeding, the said Samuel Tilton, by a bill of sale, conveyed the remaining half part of the said schooner to the said William M'Cabe and Theodore Smith, in consideration of the sum of ten hundred and fifty dollars by them paid to the said Samuel Tilton; And that on the same day last aforesaid, the said William McCabe and Theodore Smith, by a bill of sale, conveyed one quarter part of the said schooner to John Schenck, one of the Respondents, and also appointed him, the said John Schenck, Master of the same.

Fourth. That all and singular the premises are true; in verification whereof, if denied, the Respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Respondents pray that this Honorable Court would be pleased to pronounce against the Libel aforesaid, and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) WILLIAM McCABE,
THEODORE SMITH,
JOHN SCHENCK,
Respondents.

C D, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the Respondents before me.

JOHN W. DAVIS, *Clerk.*

No. 10.

Libel by a Material-man for Repairing and Furnishing a Foreign Ship, with an Answer.

[The following Libel is against the *ship* and the *master*, for repairs and other necessaries furnished the ship in a foreign port. The material-man, who supplies a foreign ship with necessaries, by the general Maritime law, has a *lien* on the specific ship, which may be enforced in Admiralty by a proceeding *in rem*, and he also has the personal security of the owners and master, unless the master takes care, by express terms, to confine the credit to the ship and owners. (*The Brig Nestor*, 1 Sumner R. 73. *The General Smith*, 4 Wheaton R. 443.) And every ship is considered foreign, when she does not belong to the same State where the repairs or necessaries are furnished. But, where repairs or necessaries are furnished in the port or State to which the ship belongs, no lien on the ship is implied, unless it is recognised by the local or municipal law of that State; in which case it may be enforced in Admiralty. (*Peyroux* v. *Howard*, 7 Peters S. C. Rep. 351.)]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Robert Jackson, of Boston, in the District aforesaid, ship-wright and ship-chandler, *against the ship Magnolia, (whereof Reuben Bates now is or late was Master,) her tackle, apparel, and furniture, and against the said Reuben Bates, and also against all persons lawfully intervening for their interest in the said ship,*[1] in a cause of contract, civil and maritime. And thereupon the said Robert Jackson alleges and articulately propounds as follows:

First. That the said ship Magnolia, of the burthen of about four hundred tons, is a foreign ship, and is now owned, and was, at the time hereinafter mentioned, owned by some

[1] For the proper variations of this commencement in order to meet different cases, see *ante*, pp. 447, 462.

persons, who were resident out of the State of Massachusetts, who are to the Libellant unknown, but who, as he is informed and believes, reside in the port of London, in the kingdom of Great Britain, and that the said ship belongs to the said port.

Second. That the said ship, on or about the 18th day of May, 1835, being in the port of Boston, in the District aforesaid, within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, and standing in need of repairs, provisions, and other necessaries in order to render her seaworthy and competent for her voyage home, the Libellant did, at the request of the said Reuben Bates, Master as aforesaid, contract and undertake properly to repair, equip, and furnish the same, so that she should be seaworthy and competent for her said voyage home.

Third. That the Libellant, on the day last above-mentioned, the said ship being within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, repaired the said ship, according to the contract alleged in the last preceding article, by mending the rigging and sails thereof in divers places, by swinging a new jib-boom, by repairing her pumps, and otherwise laboring to make her seaworthy; and also, then and there, furnished the said ship with provisions and other necessaries, consisting of ship's stores, one cable, and one anchor; the particulars of which supplies and repairs aforesaid will fully appear in the account hereto annexed, amounting in the whole to the sum of fifteen hundred dollars.

Fourth. That the said ship could not with safety have proceeded to sea on her said voyage home without the said repairs and supplies, in the next preceding article alleged; and that the said repairs were made, and the said supplies were furnished, on the credit of the said ship, as well as of the owners and Master thereof.

Fifth. That the Libellant has repeatedly requested the said Reuben Bates, Master as aforesaid, to pay him the said sum of fifteen hundred dollars; but that the said Reuben Bates has not paid the same, and still utterly refuses so to do, and that the said sum now remains entirely unpaid, to the damage of the Libellant the full sum of ———.

Sixth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court, in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of law, according to the course of Courts of Admiralty, and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said ship, her tackle, apparel, and furniture, wheresoever the same may be found; and that the said Reuben Bates, and all persons having or pretending to have any right, title, or interest in the said ship, may be cited to appear*, and answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and to decree such other relief to the Libellant, as shall to law and justice appertain, and also to condemn *the said ship, her tackle, apparel, and furniture, and the said Reuben Bates, and all persons intervening for their interest in the said ship*, in costs.[2]

(Signed) ROBERT JACKSON,
Libellant.

A B, *Proctor.*

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

[2] The conclusion of the Libel will, of course, vary according to the nature of the proceeding. The variation that has been already given, (*ante*, p. 449,) will be applicable to the present Libel.

MASSACHUSETTS, ss. ———.

Sworn to by the Libellant before me.

FRANCIS BASSETT, *Clerk.*

Claim and Answer.

[The following Answer is by the *owners* of the ship, and is in the nature of a plea to the jurisdiction, on the ground, that the ship was in a home port when the repairs and supplies were furnished, so that the material-man has only the personal security of the owners and of the master, and not a lien on the specific ship, which would entitle him to proceed *in rem.* (See *ante*, p. 502.) If the facts should not authorize an answer in the nature of a plea to the jurisdiction, the owners may allege that the repairs and supplies were not *necessaries*, and that, therefore, the master was not authorized to pledge their credit; or they may allege any other matters, which would avail in the case of a common contract, as non-performance according to agreement, excessive price, and the like.]

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now John Hollins and Nahum Wright, of Salem in the District aforesaid, merchants, *intervening for their interest in the ship Magnolia*, appear before this Honorable Court, and for Answer to the Libel and Complaint of Robert Jackson, of Boston in the District aforesaid, ship-wright and ship-chandler, *against the said ship Magnolia, her tackle, apparel, and furniture, and against Reuben Bates, late Master of the said ship, and also against all persons intervening for their interest in the said ship,*[1] allege and articulately propound as follows:

First. That the Respondents are the true and lawful own-

[1] For the proper variations of this commencement to meet other cases, see *ante*, p. 450.

ers of the said ship Magnolia, of the burthen of about four hundred tons, now lying in the port of Boston aforesaid.

Second. That the said ship is not now, nor has it ever been, a foreign ship, nor is it owned in any part by persons who are, or have been, residents out of the State of Massachusetts, nor does the said ship belong to the port of London, as is falsely alleged in the first article of the Libel aforesaid. But the said ship is now owned, and, at the time when the repairs and necessaries, in the third article of the said Libel mentioned, are therein alleged to have been furnished, was owned by the Respondents, who at that time resided, and ever since have resided, in the District of Massachusetts aforesaid, and that the said ship at the time aforesaid, and ever since, has belonged to the said port of Salem.

Third. That this Honorable Court has not jurisdiction, and ought not to proceed, to enforce the claim alleged in the Libel aforesaid against the said ship, or against them, the Respondents, intervening for their interest therein.

Fourth. That all and singular the premises are true; in verification whereof, if denied, the Respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Respondents pray that this Honorable Court would be pleased to pronounce against the Libel aforesaid, *and to decree a restoration of the said ship to the Respondents,*[1] and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) JOHN HOLLINS,
NAHUM WRIGHT,
Respondents.

C D, *Proctor.*

DISTRICT OF MASSACHUSETTS, SS. ———.
Sworn to by the Respondents before me.
FRANCIS BASSETT, *Clerk.*

[1] In regard to the insertion of this clause, see *ante*, p. 481.

No. 11.

Libel on a Charter-Party, with a Claim and Answer.

[The following Libel is against the *cargo* and the *freighter*. It alleges performance of covenants on the part of the owner, and a failure on the part of the freighter to pay the stipulated freight, also demurrage for a delay of the vessel through the negligence of the freighter. The answer denies the non-payment of the freight and also the delay.

The jurisdiction of Admiralty over Charter-Parties has been recognised in our country, (*The Schooner Volunteer and Cargo*, 1 Sumner R. 589; *The Cargo of the Brig Spartan*, 3 Amer. Jurist, 26; *The Rebecca*, 6 Amer. Jurist, 4,) though it appears not to be sustained generally in England, (*The Elizabeth*, 1 Hagg. R. 226.) The proceeding, when instituted by the owner, may be either *in rem* against the cargo, or *in personam* against the charterer, or, as in the present case, against both. Similar remedies may be resorted to by the freighter, in case of any failure on the part of the charterer to perform his covenants. A shipper on freight has a lien on the vessel for the loss of his goods, or any damage he may sustain from the fault or neglect of the master, or the insufficiency of the vessel, and he may enforce his lien by process *in rem* against the vessel. (*The Rebecca*, 6 Amer. Jurist, 4.) Though, where there is an unreasonable delay in enforcing the lien, it would probably be displaced by a *bona fide* purchaser of the ship without notice.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Solomon Lincoln, of Boston in the District aforesaid, merchant, *against the cargo lately laden on board the Schooner Zephyr (whereof Royal Morse now is or late was Master), and against Daniel P. Curtis of Boston aforesaid, merchant, and also against all persons lawfully intervening for their interest in the said cargo,*[1] in a cause of contract, civil and maritime. And there-

[1] For the proper variations of this commencement in order to meet different cases, see *ante*, pp. 447, 462.

upon the said Solomon Lincoln alleges and articulately propounds as follows:

First. That the Libellant, at Boston aforesaid, within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, on the first day of April, 1834, by a certain Charter-party of affreightment (a copy of which is hereunto annexed, and to which the Libellant craves leave to refer), then and there made and concluded between him, the Libellant, of the one part, and the said Daniel P. Curtis, of the other part, did demise and let to freight the said Schooner Zephyr, whereof Royal Morse was Master, of the burthen of two hundred tons or thereabouts, then riding in the harbour of Boston aforesaid, and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, unto the said Daniel P. Curtis, for a voyage from the port of Boston aforesaid to the port of Charleston in the State of South Carolina, and back again to the port of Boston aforesaid.

Second. That it was, among other things, covenanted by the Libellant in the Charter-party aforesaid, that the said schooner, during the voyage aforesaid, should be tight, staunch, and strong, and be sufficiently tackled and apparelled with all things necessary for such a vessel and voyage; and that it should be lawful for the said Daniel P. Curtis, his agent or factor, as well at Charleston aforesaid as at Boston aforesaid, to land and put on board the schooner a cargo of such goods and merchandise as they should think proper, contraband goods excepted.

Third. That it was agreed, among other things, by the said Daniel P. Curtis, in the Charter-party aforesaid, in consideration of the premises therein stated, to pay to the Libellant, in full for the freight and hire of the said schooner for the voyage aforesaid, the sum of one thousand dollars, in ten days after her return to the port of Boston aforesaid.

Fourth. That it was further agreed between the Libellant

and the said Daniel P. Curtis, that twenty days in all should be allowed for the loading and unloading of the said cargo at the respective ports of Boston and Charleston aforesaid; and that the said Daniel P. Curtis should pay to the Libellant ten dollars per day for each day on which the said schooner should be detained over and above the twenty days aforesaid.

Fifth. And the Libellant further alleges and propounds, that afterwards, to wit, on the 10th day of April, in the year aforesaid, at the said port of Boston, and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, the said schooner being then and there tight, staunch, and strong, and sufficiently tackled and apparelled for the voyage in the said Charter-party mentioned, the said Royal Morse, Master as aforesaid, loaded and received on board of the said schooner a full cargo of lawful goods, with which he immediately set sail and proceeded to the port of Charleston aforesaid, where, being afterwards, to wit, on the 30th day of April in the year aforesaid, arrived, the said Royal Morse, Master as aforesaid, then and there made a true delivery of the whole of the said cargo to the agents or assignees of the said Daniel P. Curtis.

Sixth. That the said Royal Morse, Master as aforesaid, afterwards, to wit, on the 14th day of May in the year aforesaid, at the said port of Charleston, and within the ebb and flow of the tide and within the Admiralty and Maritime jurisdiction of this Honorable Court, took on board the said schooner another full cargo of lawful goods, with which the said Royal Morse immediately proceeded to the port of Boston aforesaid, where he afterwards, to wit, on the 30th day of May in the year aforesaid, arrived, and made a true delivery of the said homeward cargo to the said Daniel P. Curtis, or his agents.

Seventh. That the Libellant has always, since the making

of the said Charter-party, well and truly performed and kept all and singular the covenants and undertakings on his part, according to the said Charter-party to be performed and kept; but the said Daniel P. Curtis has not well and truly performed and kept all and singular the covenants and undertakings, on his part, according to the said Charter-party to be performed and kept, as is hereinafter more particularly propounded.

Eighth. That ten days after the delivery of the said homeward cargo at Boston as aforesaid, the sum of one thousand dollars became due and payable from the said Daniel P. Curtis to the Libellant, according to the said Charter-party and the agreement of the said Daniel P. Curtis, as is alleged in the third article of this Libel.

Ninth. That the said Daniel P. Curtis, or his agent, did not send to the said schooner, in the port of Boston aforesaid, such goods as he thought proper to ship, and receive the same at the port of Charleston aforesaid, and send to the said schooner in the port of Charleston aforesaid such goods as he thought proper to ship, and receive the same from the said schooner, in the port of Boston aforesaid, within the time limited for those purposes in the said Charter-party mentioned, but neglected so to do, and, on the contrary thereof, kept and detained the said schooner for the space of fifteen days, over and above the time limited for this purpose and contrary to the form and effect of the said Charter-party, and whereby, and according to the said Charter-party, the further sum of one hundred and fifty dollars has accrued due to the Libellant.

Tenth. That the said Daniel P. Curtis has not paid to the Libellant any part of the said sum of one thousand dollars, or the further sum of one hundred and fifty dollars, although often requested thereto, and now utterly neglects and refuses so to do, to the damage of the said Libellant the full sum of ———.

Eleventh. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said cargo, and that the said Daniel P. Curtis and all other persons having or pretending to have any right, title, or interest in the said cargo may be cited to appear* and answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and to decree such other relief to the Libellant, as shall to law and justice appertain, and also to condemn the said *cargo and the said Daniel P. Curtis, and all persons intervening for their interest in the said cargo*, in costs.[1]

(Signed) SOLOMON LINCOLN,
Libellant.

A B, *Proctor.*

MASSACHUSETTS, ss. ———.

Sworn to by the Libellant before me.

FRANCIS BASSETT, *Clerk.*

Charter-Party Annexed.

THIS *Charter-Party of Affreightment*, indented, made, and fully concluded upon this first day of April, in the year of our Lord one thousand eight hundred and thirty-four,

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

[2] The conclusion of the Libel will, of course, vary according to the nature of the proceeding. The variation that has already been given will be applicable to the present Libel. See *ante*, p. 449.

between Solomon Lincoln of Boston in the District of Massachusetts, merchant, owner of the good Schooner Zephyr, of the burthen of two hundred tons, or thereabouts, now lying in the harbour of Boston aforesaid, whereof Royal Morse is at present Master, on the one part, and Daniel P. Curtis, of Boston aforesatd, merchant, on the other part, WITNESSETH, that the said Solomon Lincoln, for the consideration hereafter mentioned, has letten to freight the aforesaid schooner, with the appurtenances to her belonging, for a voyage to be made by the said Royal Morse from Boston aforesaid to Charleston in the State of South Carolina, and back again to the said Boston, where she is to be discharged, (the danger of the seas excepted:) And the said Solomon Lincoln does by these presents covenant and agree with the said Daniel P. Curtis in manner following, *that is to say*, that the said schooner in and during the voyage aforesaid, shall be tight, staunch, and strong, and sufficiently tackled and apparelled with all things necessary for such a vessel and voyage; and that it shall and may be lawful for the said Daniel P. Curtis, his agents or factors, as well at Charleston as at Boston, to load, and put on board the said schooner, loading of such goods and merchandise as they shall think proper, contraband goods excepted.

In consideration whereof, the said Daniel P. Curtis does by these presents agree with the said Solomon Lincoln, well and truly to pay, or cause to be paid, unto him the said Solomon, in full for the freight or hire of the said schooner and appurtenances, the sum of one thousand dollars in ten days after her return to the port of Boston aforesaid. And the said Daniel P. Curtis agrees to pay the charge of victualling and manning of the said schooner, and all port charges and pilotage during the said voyage, and to deliver the said schooner, on her return to the port of Boston aforesaid, to the owner aforesaid, or to his order.

And it is hereby covenanted and agreed by and between

the said parties, that twenty days in all shall be allowed for the loading and unloading of the said cargoes at the ports of Boston and Charleston, to commence at Boston on the day after the date of this Charter-party; to commence at Charleston on the day after the said Master shall be ready to make discharge of his cargo to be landed there, and notice thereof to the agent of the said Daniel P. Curtis; to commence again at Charleston on the day of the said schooner being ready to take her homeward cargo; and to commence again at Boston on the day after the said Master shall be ready to make discharge of his cargo to be landed there; and that the said Daniel P. Curtis shall pay to the said Solomon Lincoln ten dollars per day for each day in which the said schooner shall be detained over and above the twenty days as hereinbefore stipulated.

And to the true and faithful performance of all and singular the covenants, payments, and agreements afore-mentioned, each of the parties aforenamed binds and obliges himself, his executors and administrators, in the penal sum of two thousand dollars, firmly by these presents.

In witness whereof, the parties aforesaid have hereunto interchangeably set their hands and seals, the day and year above written.

(Signed) SOLOMON LINCOLN, (Seal.)
DANIEL P. CURTIS, (Seal.)

Signed, sealed, and delivered in presence of
WILLIAM PLYMPTON,
JAMES B. DOANE.

Claim and Answer.

[The following Answer admits the Charter-party, and the due performance by the Libellant of the covenants on his part; but alleges, by way of defence, payment of a certain sum, which was received by the Libellant in

full discharge of all his claims under the Charter-party, and also denies the delay in loading and unloading of the cargo, as is alleged in the Libel, and the consequent claim for demurrage thereon. For pleas at the Common Law, setting up the same defence, see 3 *Chitty's Plead.* 1009.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now Daniel P. Curtis, of Boston, in the District aforesaid, merchant, *intervening for his interest in the cargo lately laden on board the Schooner Zephyr, and also for himself*, appears before this Honorable Court, and for Answer to the Libel and Complaint of Solomon Lincoln, of Boston aforesaid, merchant, *against the said cargo, and against him the said Daniel P. Curtis, and also against all persons intervening for their interest in the said cargo*,[1] alleges and articulately propounds as follows:

First. That the Respondent is the true and lawful owner of the said cargo, lately laden on board the schooner Zephyr aforesaid, and that it was laden on board the said schooner at the port of Charleston, on or about the 14th day of May, 1834, and carried therein to the port of Boston, where it arrived on or about the 30th day of May, in the year aforesaid, and was then delivered to Charles B. Pratt, an agent of the Respondent, as is alleged in the sixth article of the Libel aforesaid.

Second. And the Respondent, admitting the several matters in the first, second, third, fourth, fifth, sixth and seventh articles of the Libel aforesaid to be true as therein alleged, further alleges and propounds, that he the Respondent, be-

[1] For the proper variations of this commencement to meet different cases, see *ante*, p. 450.

fore the day of the date of the Libel aforesaid, to wit, on the 20th day of ———, 1835, paid to the Libellant the sum of eight hundred dollars in full satisfaction and discharge of the said sum of one thousand dollars, falsely alleged in the tenth article of the Libel aforesaid to be entirely unpaid, and of all damages by the Libellant sustained, by reason of the non-payment thereof, which said sum the Libellant then and there accepted in full satisfaction and discharge of the said sum of one thousand dollars, and of all moneys accruing due under the said Charter-party.

Third. Also, that the Respondent or his agent did send to the said schooner, in the respective ports of Boston and Charleston aforesaid, such goods as he thought proper to ship, and the same from her received, in the ports aforesaid, within the time limited for those purposes in the said Charter-party mentioned, and did not keep the said schooner any time over and above the time limited for the purpose, last aforesaid; and that he is not, therefore, liable in the further sum of one hundred and fifty dollars, as is falsely alleged in the ninth article of the Libel aforesaid.

Fourth. That all and singular the premises are true; in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays that this Honorable Court would be pleased to pronounce against the Libel aforesaid, *and to decree restitution of the said cargo to the Respondent*,[1] and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed,) DANIEL P. CURTIS,
Respondent.

C D, *Proctor.*

[1] In regard to the insertion of this clause, see *ante*, p. 481.

DISTRICT OF MASSACHUSETTS, ss. ———, 18—.
Sworn to by the Respondent before me.
FRANCIS BASSETT, *Clerk.*

No. 12.

Libel in a Cause of Pilotage, with a Claim and Answer.

[The following Libel and Answer are founded upon the facts which appear in the Report of the case of *The Schooner Anne*, (1 Mason R. 508). The pilotage services were not performed by a regular Pilot, but by a mariner taken on board the Schooner Anne from a fishing vessel, which she fell in with while still at sea. Since the above case arose, the Legislature of Massachusetts (*Revised Statutes*, chap. 32, § 23,) have prohibited any Pilot, not having a branch or commission as a Pilot, or Pilot's apprentice, for the harbour of Boston, from undertaking to Pilot into or out of the said harbour any vessel, except fishing vessels and others engaged in the coasting trade. Since this enactment, the services, which are set forth in the following Libel, would not form any ground in the State of Massachusetts for a suit of pilotage; though they might, perhaps, be entertained in a claim for salvage. Indeed they are so much of the nature of salvage services, that it would not be improper in the following Libel to insert an article claiming *extraordinary* compensation on this ground. A Pilot is not precluded from instituting a suit for salvage, as well as pilotage, even though the services were performed while aboard the ship as Pilot. (*The Schooner Emulous*, 1 Sumner R. 207; *Hobart et al.* v. *Dorgan et al.*, 10 Peters S. C. R. 108.) The Pilot, like the mariner, may proceed against the ship *in rem*, or against the owners or master; or against all three.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.
——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Josiah Hodges, of Boston, in the District aforesaid, late mariner on board the Schooner Reindeer, *against the Schooner Anne* (*whereof William*

Pounce now is or late was Master), *her tackle, apparel, and furniture, and against the said William Pounce, of Cork in Ireland, in the kingdom of Great Britain, and also against all persons lawfully intervening for their interest in the said schooner*,[1] in a cause of Pilotage, civil and maritime. And thereupon the said Josiah Hodges alleges and articulately propounds as follows:

First. That the Libellant, being a mariner on board the said Schooner Reindeer, a small fishing vessel, belonging to the port of Boston aforesaid, on or about the 10th day of July, 1818, on or near a place called *Brown's Bank*, on the high seas, and within the ebb and flow of the tide and within the Admiralty and Maritime jurisdiction of this Honorable Court, encountered and fell in with the said Schooner Anne, whereof William Pounce then was the Master; and the Libellant, then and there, at the special instance and request of the said William Pounce, undertook to pilot the said Schooner Anne from the said Brown's Bank to Philadelphia, or New York, or Boston, all three being ports in the United States of America, as should be deemed most expedient for the safety and convenience of the said Schooner Anne and for the Master and crew thereof, the said William Pounce, then and there, promising to pay him, the Libellant, a reasonable compensation therefor.

Second. That the Libellant in the due performance of his undertaking aforesaid, immediately assumed the management and navigation of the said Schooner Anne, and exerted himself, as pilot, very much for the good of the said Schooner, and of the persons on board the same, for the space of eight days, and safely conducted her into the port of Boston aforesaid.

Third. That the services aforesaid were highly important and valuable, and that the said William Pounce or the

[1] For the proper variations of this commencement in order to meet other cases, see *ante*, pp. 447, 462.

owners of the said schooner ought to have paid the Libellant one hundred dollars, as a reasonable compensation therefor, yet, though often requested, neither the said William Pounce nor the owners of the said schooner have paid the said sum or any part thereof, but utterly refuse so to do, to the damage of the Libellant the full sum of ———.

Fourth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue *against the Schooner Anne, her tackle, apparel, and furniture, wheresoever the same shall be found, and that the said William Pounce, and all persons having or pretending to have any right, title, or interest in the said schooner*[1] *may be cited to appear* and answer upon oath all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and to decree such other relief to the Libellant as shall to law and justice appertain, *and also to condemn the said schooner, her tackle, apparel, and furniture, and the said William Pounce and all persons intervening for their interest in the said schooner*, in costs.[2]

(Signed) JOSHUA HODGES,
Libellant.

A B, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the Libellant before me.

JOHN W. DAVIS, *Clerk.*

1 In regard to requiring the answer to be on oath, see *ante*, p. 124.

2 The conclusion of the Libel will of course vary according to the nature of the proceeding. The variation that has been already given will be applicable to the present Libel. See *ante*, p. 449.

Claim and Answer.

[The following Claim and Answer were interposed by the British Consul for the owners of the *Schooner Anne*. (See *The Schooner Anne*, 1 Mason R. 508; also *ante*, p. 517.) An Answer should also be given in by the Master.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now William C. McCormick and Patrick Riley, of Cork in Ireland, in the Kingdom of Great Britain, merchants by George Manners, the Consul of his Britannic Majesty within and for the State and District aforesaid, *intervening for their interest in the schooner Anne*, appear before this Honorable Court, and for Answer to the Libel and Complaint of Josiah Hodges of Boston aforesaid, late mariner on board the Schooner Reindeer, *against the Schooner Anne, her tackle, apparel, and furniture, and against William Pounce of Cork in Ireland in the kingdom of Great Britain, and also against all persons lawfully intervening for their interest in the said schooner*,[1] allege and articulately propound as follows:

First. That the Respondents are the true and lawful owners of the said Schooner Anne, a vessel of two hundred tons or thereabouts, now lying in the port of Boston in the District aforesaid, whereof Jonathan Lincoln now is and late was Master, and not William Pounce, as is falsely alleged in the Libel aforesaid.

Second. That the Respondents admit, that the pilotage service, in the said Libel alleged, was performed by the Libellant, as in the said Libel is alleged; but they further allege and propound, that they are not liable therefor, the

[1] For the proper variations of this commencement, in order to meet other cases, see *ante*, p. 450.

said service not being rendered on the credit of the said schooner, or of them as owners, but solely on the personal credit of certain individuals then on board the same, as is hereinafter particularly propounded.

Third. That the said Schooner Anne was chartered at some time in the month of June, 1818, at Cork, aforesaid, to proceed from thence to Quebec, in the Province of Lower Canada, with passengers, and on the 10th of the month of June aforesaid sailed from Cork aforesaid, with upwards of sixty passengers on board, ostensibly destined for Quebec aforesaid; that, after the said schooner had been out for some time, the passengers therein required of the said Jonathan Lincoln, Master as aforesaid, to carry them either to New York or to Philadelphia, both being ports in the United States of America, and not to Quebec, alleging that they had contracted to be landed at one of these ports; and that the said passengers, on the refusal of the Master to comply with their requisition as aforesaid, on the 17th day of August in the year aforesaid, rose upon him the said Master, and, with great force and violence and threats, drove him down into the cabin of the said schooner, and there forcibly detained him, and placed William Pounce, the mate of the said schooner, in the command of the same, the said William Pounce first having been compelled by the said passengers to take an oath, that he would carry the said schooner into one of the ports above mentioned, or into the port of Boston aforesaid.

Fourth. That very soon after the mutiny by the passengers, in the next preceding article alleged, the said schooner began to fall short of provisions, and the passengers aforesaid were reduced to a very small allowance for many days, and suffered great anxiety for fear of starvation, which continued until they encountered and fell in with the Schooner Reindeer, as is alleged in the first article of the Libel aforesaid, the said schooner being a small fishing

vessel then on a cruise for the purpose of taking fish; that the said passengers obtained from the said Schooner Reindeer a supply of provisions, and also engaged one of the crew thereof, being the present Libellant, to navigate and conduct the said Schooner Anne, as pilot, into the port of Boston aforesaid.

Fifth. That the Libellant came on board the said Schooner Anne and undertook to navigate and conduct her, as pilot, as aforesaid, at the special instance and request of William Pounce, the mate, and the passengers aforesaid, who then had, and ever since the mutiny aforesaid had kept, the command of the said schooner; and that the Libellant made his contract for pilotage with them, the said William Pounce and the passengers aforesaid, and not with the said Jonathan Lincoln, the lawful Master of the said schooner.

Sixth. That the said William Pounce and the passengers aforesaid had no authority to bind the said schooner, or the owners thereof; and that the said contract was entered into on the personal credit of the said William Pounce and of the passengers aforesaid, and not on the credit of the said schooner, or of the owners thereof; and that the Respondents are not liable for the compensation to the Libellant promised by the said William Pounce and the passengers aforesaid, or for any part thereof.

Seventh. That all and singular the premises are true; in verification whereof, if denied, the Respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Respondents pray that this Honorable Court would be pleased to pronounce against the Libel aforesaid, *and to decree a restitution of the said schooner to the Respondents,*[1] and to condemn the Libellant in costs,

[1] With regard to the insertion of this clause, see *ante*, p. 481.

and otherwise right and justice to administer in the premises.

(Signed) WILLIAM C. MCCORMICK,
by his Attorney GEORGE MANNERS,
PATRICK RILEY,
by his Attorney GEORGE MANNERS,
Respondents.

C D, *Proctor.*

DISTRICT OF MASSACHUSETTS, SS. ———.

Sworn to by George Manners, Attorney of William McCormick and Patrick Riley, according to the best of his knowledge and belief, before me.[1]

JOHN W. DAVIS, *Clerk.*

No. 13.

Libel in a Cause of Pilotage, with an Answer.

[The following Libel is by a regular Pilot of the harbour of Boston against the *ship* and the *master*. It alleges that the Libellant was duly appointed and qualified according to law (*Revised Statutes* of Massachusetts, chap. 32, § 16 and 17); and that he offered his services to the Master of the ship before the ship had "passed a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head," the line specified by the Legislature of Massachusetts (*Revised Statutes*, chap. 32, § 7 and 24) as the limit, outside of which any Branch Pilot is authorized and directed to take charge of vessels bound into the harbour of Boston. It also alleges that the services performed were of an extraordinary nature, owing to a severe gale, so that the Libellant deserves an extra compensation. (See *ante*, p. 517.) The Answer is made by the *Master*, and it denies that the Libellant boarded the ship before it had passed the line above mentioned, and that the services performed were of an extraordinary nature; and it alleges, that the Master himself wished to pilot his own ship into the harbour, of which the

[1] An agent, or attorney, who makes claim or puts in an answer, should swear according to his knowledge and belief.

Libellant had notice. Besides the Answer of the Master, a Claim and Answer should be interposed, in the present case, by the owners of the ship.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Jacob Towne, of Boston in the District aforesaid, Pilot, *against the Brig Rome (whereof William Bruce now is or late was Master), her tackle, apparel, and furniture, and against the said William Bruce, Master as aforesaid, and also against all persons lawfully intervening for their interest in the said brig*,[1] in a cause of Pilotage, civil and maritime. And thereupon the said Jacob Towne alleges and articulately propounds as follows:

First. That the Libellant is now, and was at the times hereinafter mentioned, a pilot for the harbour of Boston aforesaid, appointed by the Commissioners of Pilots for the harbour aforesaid, from whom he has received a branch or warrant for the due execution of his office; and that he is now, and was at the time hereinafter mentioned, qualified according to law for the performance of the duties thereto appertaining.

Second. That, on the 16th day of November, 1835, about fifteen miles below the Boston Light-House, to wit, on the high seas, and within the ebb and flow of the tide, and within the Admiralty and Maritime jurisdiction of this Honorable Court, the Libellant boarded the brig Rome aforesaid, (whereof the said William Bruce then was Master,) the said brig being on a return voyage from the port of Havana, in the Island of Cuba, and bound into the harbour of

[1] For the proper variations of this commencement in order to meet different cases, see *ante*, pp. 447, 462.

Boston aforesaid, and not having passed a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head; and the Libellant, having shown the Master of the said brig his branch or warrant as pilot, took charge of, and assumed the conduct and navigation of the same, into the harbour of Boston aforesaid.

Third. That the Libellant exerted himself very much for the space of two days in piloting the said brig, during which period the winds were strong and contrary, and at one time blew such a gale as to place the lives of all on board the said brig, and also the said brig itself, in imminent jeopardy; that the Libellant, through his great care and skill, and his intimate knowledge of the dangers of the harbour of Boston aforesaid, and with great personal labor and suffering, succeeded in conducting the said brig safely to one of the wharves of the said harbour.

Fourth. That, in consideration of the character of the Libellant, and of the services in the two next preceding articles alleged, there has accrued and become due to the Libellant, from the owners of the said brig, and from the Master thereof, according to the scale of fees for pilotage services established by the Governor of the Commonwealth of Massachusetts, the sum of fifty dollars.

Fifth. And the Libellant further alleges and propounds, that the extraordinary services by him rendered to the said brig, and the great and successful exertions made by him for the safety of the said brig, and of the lives of all on board, entitle him to have and demand an extra compensation from the owners and the Master thereof, to wit, the further sum of one hundred dollars.

Sixth. That neither the said William Bruce, Master aforesaid, nor the owners of the said brig, have paid the Libellant either of the said sums, or any part thereof, though often requested so to do; but, on the other hand, utterly refuse to pay the same; and the said sums now remain en-

tirely unpaid, to the damage of the Libellant the full sum of ———.

Seventh. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said brig, her tackle, apparel, and furniture, wheresoever the same shall be found, and also against the said William Bruce, Master of the same, and that the said William Bruce, and all persons having or pretending to have any right, title or interest in the said brig, may be cited to appear, and* to answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to pronounce for the damages aforesaid, and for such other relief to the Libellant as shall to law and justice appertain, and also to condemn *the said brig, her tackle, apparel, and furniture, and the said William Bruce and all persons intervening for their interest in the said brig,*[2] in costs.

(Signed) JACOB TOWNE,
Libellant.

A B, *Proctor.*

MASSACHUSETTS, ss. ———, 18—.
Sworn to by the Libellant before me.

FRANCIS BASSETT, *Clerk.*

[1] In regard to requiring the answer to be under oath, see *ante*, p. 124.

[2] The conclusion of the Libel will of course vary according to the nature of the proceeding. The variation that has been already given, (*ante*, p. 449,) will be applicable to the present Libel.

Answer.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Hon. JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now William Bruce, of Boston, in the District aforesaid, Master of the Brig Rome, appears before this Honorable Court, and for Answer to the Libel and Complaint of Jacob Towne, of Boston aforesaid, *against the said brig Rome, her tackle, apparel, and furniture, and against the said William Bruce, and also against all persons intervening for their interest in the said brig,*[1] alleges and articulately propounds as follows:

First. That the Respondent now is, and was at the times alleged in the second article of the Libel aforesaid, Master of the brig Rome aforesaid.

Second. And the Respondent, admitting that the Libellant is now and was a pilot for the harbour of Boston aforesaid, duly appointed by the Commissioners of Pilots for the harbour aforesaid; and that he was qualified according to law for the performance of the duties of pilot, as is alleged in the first article of the Libel aforesaid; and also, that he boarded the said brig and took charge of the same in the manner hereinafter mentioned, and not otherwise; nevertheless, in further defence to the Libel aforesaid, alleges and propounds as follows.

Third. That the said brig Rome, being on a return voyage from the port of Havana in the Island of Cuba, and bound into the harbour of Boston aforesaid, was boarded on the 16th day of November, 1835, by the Libellant, at a place a few

[1] For the proper variations of this commencement to meet other cases, see *ante*, p. 450.

miles below the Boston Light-House, and some time after the said brig had passed a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head, and not before the said brig had passed the line aforesaid, as is falsely alleged in the second article of the Libel aforesaid.

Fourth. That the Respondent was desirous, and, according to law, was at liberty to pilot his own vessel into the harbour of Boston aforesaid, no Boston branch pilot having offered his services to the Respondent before the said brig had passed the line in the next preceding article mentioned; of all which the Libellant had notice as soon as he boarded the said brig; and that the services of the Libellant were rendered without any request from the Respondent, and contrary to his wishes, as fully expressed at the time, to him, the Libellant.

Fifth. That the Libellant, contrary to the express wishes of the Respondent as aforesaid, took charge of, and assumed the conduct and navigation of the said brig, and continued on board the same for the space of two days, and finally conducted her to one of the wharves of the harbour of Boston aforesaid, as is alleged in the third article of the Libel aforesaid, during all which time the Libellant discharged the ordinary duties of a pilot, and the weather was and continued exceedingly mild and moderate.

Sixth. That the Libellant did not exert himself beyond the ordinary exertions of pilots in the discharge of their duties, for the space of two days as aforesaid; that the winds, during the said period, were not strong and contrary, and did not blow such a gale as to place the lives of all on board the said brig, and also the said brig itself, in imminent jeopardy; that no extraordinary danger was encountered by the said brig in coming up the harbour of Boston aforesaid, and that no extraordinary care or skill was required by the situation of the said brig, or actually exercised by the Libellant; and that he was not put to any great personal labor and suffering, in piloting her to one of the wharves of the said harbour;

all of which is falsely alleged to the contrary in the third article of the Libel aforesaid.

Seventh. That in consideration of the premises, there has not accrued or became due to the Libellant, from the Respondent, any sum or sums of money, although it is falsely alleged to the contrary in the fourth and fifth articles of the Libel aforesaid; nor has the Libellant suffered any damage because the Respondent has refused to pay the sums in the Libel aforesaid mentioned, as is falsely alleged in the sixth article of the said Libel.

Eighth. That all and singular the premises are true; in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays that this Honorable Court would be pleased to pronounce against the Libel aforesaid, and to condemn the Libellant in costs, and otherwise right and justice to administer in the premises.

(Signed) WILLIAM BRUCE,
Respondent.

C D, *Proctor.*

MASSACHUSETTS, SS. ———

Sworn to by the Respondent before me.

FRANCIS BASSETT, *Clerk.*

No. 14.

Libel in a Cause of Salvage, with a Claim and Answer.

[The following Libel is brought by the owners and Masters of two fishing smacks, and their respective crews, for salvage; and it proceeds *in rem* against the ship and cargo. Salvage proceedings may, however, as well be by process *in personam* as *in rem.* (*The Schooner Boston and Cargo*, 1 Sum-

ner R. 329–341; *The Hope*, 3 Rob. R. 215; *The Trelawney*, 3 Rob. R. 216, *note*.) Where the libel is in behalf of the crew, it will be sufficient if, without mentioning individually the name of each one, it makes them a party by a description of their character, as is done in the following example. (*The Schooner Boston and Cargo*, 1 Sumner R. 329.)]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

———Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

The Libel and Complaint of Edward Scott, of Plymouth in the District aforesaid, Master and owner of the fishing smack called The Pink, and of John Rogers, of Scituate in the District aforesaid, the Master and owner of the fishing smack called The Swift, and of the respective crews of the said smacks, *against the Ship Rufford* (*whereof George Tollwin now is or late was Master*), *her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises now or late on board the said ship*,[1] in a cause of Salvage, civil and maritime. And thereupon the said Edward Scott, John Rogers, and the respective crews of the smacks aforesaid, allege and articulately propound as follows:

First. That on Saturday the 23d day of January last, the said smack called The Pink, of the burthen of thirty-seven tons, or thereabouts, (whereof the said Edward Scott was Master and owner) sailed from Plymouth aforesaid on a fishing voyage, and that the said smack was manned with a crew of nine men, exclusive of the said Edward Scott, and fully and completely equipped and set forth for the said voyage. And that on Sunday the 24th day of the said month of January, the said smack called The Swift, of the burthen of fifty tons, or thereabouts, (whereof the said John Rogers was Mas-

[1] For the proper variations of this commencement in order to meet different cases, see *ante*, pp. 447, 462.

ter and owner,) sailed from Scituate aforesaid on a fishing voyage; and that the said smack last mentioned was likewise manned with a crew of nine men, exclusive of the said John Rogers, and fully and completely equipped and set forth for such voyage.

Second. That, between ten and eleven o'clock in the forenoon of the following Wednesday, to wit, the 27th day of January (it blowing hard and the sea running high), the said two fishing smacks were in company together, in the prosecution of their aforesaid voyages, when the said Edward Scott and John Rogers, and their respective mariners, descried a ship in distress upon the ——— sands; and that both the said smacks made for the said ship in distress, and in about an hour afterwards were brought up near to her, in order to render to her every possible assistance; for which purpose the boats of the said two smacks were thereupon hoisted out, and the said Edward Scott, with four of his crew, and the said John Rogers, with four of his crew, immediately proceeded therein to, and got on board of, the said ship, and which they found to be the Rufford of Boston in the District aforesaid, of the burthen of two hundred and fifty tons, or thereabouts, (whereof George Tollwin was Master,) having on board a crew of about thirteen men and two ladies passengers, and laden with a valuable cargo of tallow, flax, and other merchandise, bound from St. Petersburgh to Boston aforesaid, being the very ship proceeded against in this cause.

Third. That the said ship, the Rufford, was then in a very dangerous situation, and in great hazard of being lost, and that the said George Tollwin, the Master, begged or requested the aforesaid Edward Scott and John Rogers, that they, with their smacks and crews, would assist and preserve the said ship and cargo, or to that effect; and that the said ship and cargo were thereupon put under the care of them the said Edward Scott and John Rogers, who, with

their men, immediately set about using their best endeavours to preserve the same.

Fourth. That the said Edward Scott and John Rogers, having caused the boats belonging to their respective smacks, and also two boats belonging to the Rufford, to be made fast to the said ship, and having cleared the decks and set the sails of the said ship, in order, if possible, to force her off the said sand, they waited until about seven o'clock in the evening of the said 27th day of January, when, with the help of the tide, they got the said ship off the said sand, and brought her up to anchor in a fair channel; but, there being a great deal of sea, the said ship's longboat was thereby stove.

Fifth. That the said ship rode at anchor the whole ebb with the wind blowing hard, and varying from the WNW. to WSW.; but that, the said ship making much water, the pumps on board thereof were obliged to be kept constantly going, in order to keep her from sinking; that the people belonging to the said smacks, as well as the crew of the said ship, being all thereby much fatigued, and the wind blowing fresh, and the said ship and cargo then still being in great danger of sinking, it was thought advisable to endeavour to get the same into the harbour of ———, that being the nearest port of safety; and that accordingly about six o'clock of the following morning, being Thursday the 28th day of January, the said Edward Scott and John Rogers hove in the said ship, and, with much difficulty and danger, about seven o'clock in the evening of the same day, got her into the harbour aforesaid, and there brought her to an anchor, it being too dangerous to attempt getting her on shore that night, the weather being thick and blowing hard.

Sixth. That, during the night of the 28th day of January aforesaid, it blew a violent gale of wind, which continuing until the morning of Saturday the 30th day of January aforesaid, the said Edward Scott and John Rogers were

obliged to keep the pumps constantly going, in order to save the said ship from sinking; but that about eight o'clock in the morning of the said Saturday the 30th day of January aforesaid, the wind being abated, and the tide answering to put the said ship on shore, they got up her anchor and laid her on shore, the said Edward Scott and John Rogers with their men continuing however on board the said ship, and further assisting until the night of the next day, being Sunday the 31st day of January aforesaid, when they left her on shore in safety; having previously, to wit, in the morning of the day last mentioned, returned on board the said ship the goods which it had been necessary to take out in order to lighten her as aforesaid.

Seventh. That from the time of the said smacks going to the assistance of the said ship Rufford on the said 27th day of January last, to the time of her being laid on shore at the port of ——— in safety on the 30th day of the same month, as mentioned in the next preceding article, the said smacks were constantly attending the said ship, the leaky condition whereof made it absolutely necessary to keep her pumps constantly going, by reason of the scarf or box of her keel and stem being open an inch (and which the party proponent doth allege could not be stopped, until the ship was laid on shore at the port of ———); and that the Masters and crews of the said smacks used their utmost endeavours in preserving the said ship and cargo, and the lives of the crew of the same; and that, in attending to the preservation of the said ship and cargo, the Masters and crews of the said smacks ran great risk, not only of their own lives, but also of the loss of their respective smacks, for that, in case a storm had arisen before the said ship's arrival in the harbour of ———, neither of the said smacks had sufficient hands left on board to manage them (the prime hands belonging to the smacks being all employed on board the Rufford).

Eighth. That, on the night of Thursday the said 28th day of January last, both the smacks then lying near the Rufford, and the whole of the crews of the said smacks being employed in pumping on board the Rufford, excepting three hands left on board each of the said smacks, the Pink, by the violence of the weather and the insufficiency of the people left on board to her preservation, was virtually driven on shore on ——— beach; but did not thereby receive any essential injury, owing to the providential circumstance of its having happened in harbour, without which the said smack would in all probability have been lost or destroyed.

Ninth. That, without the assistance herein before pleaded, the said ship Rufford could not have been saved, for that she had been on ——— sand, from about eight o'clock in the evening of Tuesday the said 26th day of January last; and that, previous to the smacks arriving to her assistance, she had been on shore two ebbs and a flood, but that such flood had not lifted or floated the said ship; and that, if she had continued on the said sand until the night of Thursday the said 28th day of January, in the violent gale which drove the Pink on shore, although in harbour, as before alleged, the total loss of both ship and cargo could not have been prevented.

Tenth. That whilst the said smacks, the Pink and the Swift, were sailing towards the said ship in distress on the ——— sand in the forenoon of the said 27th day of January last, as mentioned in the second article of this Libel, a boat was observed from the said smacks to be making towards the said ship, which proved to be the Rufford libellate; and that such boat was afterwards found to be one of the boats belonging to the said ship Rufford, which had quitted and left the said ship, with the Master, two ladies passengers, and four of the crew, for personal preservation, by endeavouring to make the shore; but which boat returned to the said ship in consequence of the persons therein perceiving the

smacks making to their assistance. And several of the crew of the said ship Rufford, who remained on board, after the Master and others had quitted her as aforesaid, declared to the persons belonging to the smacks, that they should all have likewise left the said ship, if the said smacks had not come to their assistance, or to that effect.

Eleventh. That the said Edward Scott, the Master and owner of the smack called The Pink, and the said John Rogers, the Master and owner of the smack called The Swift, and the respective crews of the said smacks, by reason of the risk and hazard they ran, and the service they performed, in saving the said ship Rufford and her cargo, deserve, and are justly entitled to, meet and competent salvage for such service, and to so much as has been and is actually allotted by this Court to persons doing and performing the like service, together with all charges and expenses attending the same.

Twelfth. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Libellants pray, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue *against the said ship Rufford, her tackle, apparel, and furniture, and against the cargo laden therein, wheresoever the same shall be found, and that all persons having or pretending to have any right, title, or interest in the said ship and cargo may be cited to appear* and answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to decree such a sum of money, or proportion of

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

the value of the said *ship Rufford and her cargo*, to be due to the Libellants, as a compensation for their said salvage services, as shall seem meet and reasonable, together with their expenses in this behalf sustained, and to condemn *the said ship, her tackle, apparel, and furniture, and the cargo laden therein, and all persons intervening for their interest in the said ship*,[1] in costs, and otherwise right and justice to administer in the premises.

(Signed) EDWARD SCOTT,
JOHN ROGERS,
for themselves and the respective crews of the smacks The Pink and The Swift.

A B, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the said Edward Scott and John Rogers before me.

FRANCIS BASSETT, *Clerk.*

Claim and Answer.

[The following Answer is by the owner of the *cargo* only. It admits the performance of the salvage services, as is alleged in the Libel, but alleges an embezzlement of part of the salved goods by the salvors, and the consequent forfeiture of the right of salvage. (See *The Schooner Boston and Cargo*, 1 Sumner R. 329.) In the present case a Claim and Answer should also be put in by the owner of the ship.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now William Eustis, of Boston, in the District afore-

[1] The conclusion of this Libel should be varied according to the nature of the proceeding. See *ante*, p. 449.

said, merchant, *intervening for his interest in the cargo on board the ship Rufford*, appears before this Honorable Court, and claims the said cargo as his property, and for Answer to the Libel and Complaint of Edward Scott, of Plymouth, in the District aforesaid, Master and owner of the fishing smack called The Pink, and of John Rogers, of Scituate, in the District aforesaid, Master and owner of the fishing smack called The Swift, and of the respective crews of the said smacks, *against the said ship Rufford, her tackle, apparel, and furniture, and against all and singular the goods, wares, and merchandises now or late on board the said ship*,[1] alleges and articulately propounds as follows:

First. That the Respondent is the true and lawful owner of the cargo now on board the said ship Rufford, consisting of 200 casks of tallow, 1500 pounds of flax, 1000 pounds of hemp, and 500 bars of iron, and which he alleges to be the same goods, wares, and merchandises proceeded against by the Libellants in the present cause.

Second. That the Respondent, admitting all and singular the matters alleged in the Libel to be true, as therein alleged, nevertheless further alleges and propounds, that the Libellants, all and singular, do not deserve and are not entitled to salvage, because on a day unknown to the Respondent, but since the arrival of the said ship Rufford and her cargo in the harbour of Boston aforesaid, they have tortiously converted to their own use and embezzled certain of the goods, wares, and merchandise aforesaid, and which were by them salved, to wit, 50 casks of tallow and 200 pounds of flax, which, after the arrival of the said ship at Boston as aforesaid, they caused to be taken from her secretly and covertly, and without the knowledge of any party in inte-

[1] For the proper variations of this commencement in order to meet other cases, see *ante*, p. 450.

rest, and conveyed to a store or warehouse in Boston aforesaid, there to be sold on their own account.

Third. That in consideration of the premises, each and all of the Libellants have forfeited all claim and title to compensation out of the cargo aforesaid, or from the owner thereof, for the salvage services alleged in the Libel aforesaid, and that accordingly this Honorable Court ought not to decree such compensation.

Fourth. That all and singular the premises are true; in verification whereof, if denied, the Respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Respondent prays that this Honorable Court would be pleased to pronounce against the Libel aforesaid, *and to decree a restitution of the said goods, wares, and merchandises, to the Respondent,*[1] and to condemn the Libellants in costs, and otherwise right and justice to administer in the premises.

(Signed) WILLIAM EUSTIS,
Respondent.

C D, *Proctor.*

DISTRICT OF MASSACHUSETTS, SS. ———.

Sworn to by the said William Eustis before me.

FRANCIS BASSETT, *Clerk.*

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[1] In regard to the insertion of this clause, see *ante*, p. 481.

No. 15.

Libel in a Cause of Salvage (derelict), with two different Claims.

[The following Libel and the first Claim are founded upon the facts which appear in the report of the case *Rowe et al.* v. *Brig* ———, 1 Mason R. 372.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

THE Libel and Complaint of Isaac F. Rowe, of Boston in the District aforesaid, Merchant, and owner of the Schooner Hope, as well for himself as for Henry Geyer, the Master of the said schooner, and also for the crew thereof, against a certain brig of an unknown name, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises laden therein, found floating upon the high seas and within the Admiralty and Maritime jurisdiction of this Honorable Court, and since brought to Boston aforesaid, as being a ship and goods derelict, in a cause of Salvage, civil and maritime. And thereupon the said Isaac F. Rowe, as well for himself as for the said Henry Geyer and for the crew of the said Schooner Hope, alleges and articulately propounds as follows:

First. That on the 28th day of October, 1817, the said Schooner Hope, of the burthen of seventy-five tons or thereabouts, (whereof the said Isaac F. Rowe was owner and the said Henry Geyer was Master), sailed from the port of Boston aforesaid on a fishing voyage, and that the said schooner was manned with a crew of four men, exclusive of the said Henry Geyer, and fully and completely equipped for the said voyage.

Second. That on the 30th day of the month aforesaid, and two days after the said schooner had sailed from the port of Boston aforesaid, the wind then blowing a heavy squall, the said Henry Geyer and his crew discovered a vessel about four miles' distance from them, apparently in great distress; that they immediately ran down to the said vessel and got on board of her, when they found her to be a brig, with a valuable cargo, entirely derelict and without any person on board, and in a very shattered condition, being the very vessel proceeded against in this cause.

Third. That the said Henry Geyer and his crew first attempted to take out the goods, wares, and merchandise laden in the said brig and convey them on board the said Schooner Hope; but that the weather being so tempestuous, and the sea running so high as to render this impracticable, they determined to endeavour to bring the said brig and her cargo into the port of Boston aforesaid.

Fourth. That the said Henry Geyer and two of his crew went on board of the said brig, the said schooner being ordered to keep close company, and undertook to bring her into the port of Boston aforesaid; That after three days, during which they labored incessantly and underwent great perils, in their endeavours as aforesaid, by reason of a severe storm and heavy gales of wind, which separated them from the said schooner, they succeeded in bringing the said brig into the harbour of Boston aforesaid, and in running her on shore at Thompson's Island, in the said harbour; and that they afterwards got her off the said island and brought her safely up to one of the wharves of the port of Boston aforesaid.

Fifth. That without the assistance hereinbefore pleaded the said brig could not have been saved; for that she was deserted by her officers and crew, and seriously injured and shattered, and in this condition was exposed to the violent

storms of the ocean, to the rolling of the waves, and the heavy squalls of the winds.

Sixth. That the said Isaac F. Rowe, owner of the Schooner Hope aforesaid, and the said Henry Geyer, Master of the said schooner, and the crew thereof, by reason of the great risk and hazard they ran, and the service they performed in saving the said brig and her cargo, deserve and are justly entitled to meet and competent salvage for such service, and to so much as has been and is actually allotted by this Court to persons doing and performing the like service, together with all charges and expenses attending the same.

Seventh. That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court; in verification whereof, if denied, the Libellant craves leaves to refer to the depositions and other proofs to be by him exhibited in this cause.

WHEREFORE the Libellant prays, that process, in due form of law, according to the course of Courts of Admiralty and of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may *issue against the said brig, her tackle, apparel, and furniture, and against the cargo laden therein, wheresoever the same shall be found, and that all persons having or pretending to have any right, title, or interest in the said brig and cargo may be cited to appear* and answer upon oath[1] all and singular the matters so articulately propounded; and that this Honorable Court would be pleased to decree such a sum of money or proportion of the value of the said brig and her cargo, to be due to the Libellants, as a compensation for their said salvage services, as shall seem meet and reasonable, together with their expenses in this behalf sustained, and to condemn the said brig, her tackle, apparel and furniture, and the cargo

[1] In regard to requiring the answer to be on oath, see *ante*, p. 124.

laden therein, and all persons intervening for their interest in the said brig and cargo, in costs, and otherwise right and justice to administer in the premises.

(Signed) ISAAC F. ROWE,
for himself and for Henry Geyer and the crew of the Schooner Hope.

A B, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the said Isaac F. Rowe before me.

JOHN W. DAVIS, *Clerk.*

Claim.

[The following Claim is made by the Spanish Consul, intervening for the interest of certain Spanish subjects unknown, in the derelict brig and cargo. In regard to his competency for this purpose, see *ante*, pp. 153–154.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now ————, of Boston in the District aforesaid, Consul of his Catholic Majesty the King of Spain, for the port of Boston aforesaid, intervening for the interest of certain subjects of his Catholic Majesty, whose names are to the said Consul as yet unknown, in a certain brig and the cargo therein, (being the same described in the Libel and Complaint of Isaac F. Rowe, of Boston aforesaid, as of an unknown name, and all and singular the goods, wares, and merchandises laden therein, found floating upon the high seas and within the Admiralty and Maritime jurisdiction of this Honorable Court, and since brought to Boston aforesaid as being a ship and goods derelict,) appears before

this Honorable Court, and in behalf of the said subjects of his Catholic Majesty, and for the protection of their interest, CLAIMS the said brig, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises laden therein, subject to salvage, and thereupon prays that this Honorable Court, after awarding to the Libellants meet and competent Salvage, would be pleased to decree a restitution of the same to him for the benefit of the subjects aforesaid, and otherwise right and justice to administer in the premises.

———.

C D, *Proctor.*

MASSACHUSETTS, SS. ———.

Sworn to by the said ———, according to the best of his knowledge and belief, before me.

JOHN W. DAVIS, *Clerk.*

Another Claim.

[The following Claim is entirely independent of the preceding one, and has been drawn, in order to present an example of the way in which a different party, under different circumstances, may appear before the Court. The Claim is made by the Master and owner in behalf of himself and another owner, and sets forth the circumstances under which the ship and cargo were left derelict.]

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, SS.

——— Term, 18—.

To the Honorable JOHN DAVIS, *Judge of the District Court of the United States within and for the District of Massachusetts.*

AND now Antonio Vega, of Rio Janeiro, in the kingdom of Brazil, Master of the brig called the Esperanza, and a subject of his Brazilian Majesty, intervening for his interest in a certain brig and the cargo therein, (being the same described in the Libel and Complaint of Isaac F.

Rowe, of Boston in the District aforesaid, as of an unknown name, and all and singular the goods, wares, and merchandises laden therein, found floating upon the high seas, and within the Admiralty and Maritime jurisdiction of this Honorable Court, and since brought to Boston aforesaid, as being a ship and goods derelict,) appears before this Honorable Court, and on behalf of himself, and of Josef Diaz, of Rio Janeiro aforesaid, also a subject of his Brazilian Majesty, the true and lawful owners of the said brig and cargo, CLAIMS the said brig, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises laden therein, subject to salvage, and further alleges and articulately propounds as follows:

First. That the said Antonio Vega was the Master of the said Brazilian brig Esperanza, of the burthen of one hundred and fifty tons or thereabouts, and that having taken in, at Rio Janeiro aforesaid, a cargo of hides, (consisting of ———) the said brig sailed therewith on the 6th day of September last, bound to Boston aforesaid; that the said brig continued her voyage until the 10th day of the month of October next ensuing, when (being in the North Atlantic Ocean, in latitude 42° 57′ North) the wind came on to blow very strong from the SSW., with a heavy sea, which afterwards increased by the wind changing to NNW.; that in the evening of the same day the said brig began to leak, which obliged all hands to pump her for three hours, and that the weather then becoming more moderate, they gained on the leak, having previously been obliged to throw some spars overboard in order to lighten the said brig; that on the 20th day of the said month of October, the leak increasing, and the said brig having by the violence of the weather lost her rudder, the said Antonio Vega and his crew, fearing she would go to pieces, hoisted a signal of distress, and an English ship, called the Bessey, of London, having thereupon borne down upon them, he, with his said

crew, quitted his said brig the Esperanza, and for personal preservation went on board the said Ship Bessey, in which they were carried to the port of New York, in the United States of America, where they landed on the 30th day of the said month of October.

Second. That the said Antonio Vega has been informed and believes, that the said brig was afterwards taken up at sea by the Master and crew of the Schooner Hope, being the Libellants in this cause, and brought to Boston aforesaid.

Third. That the said Antonio Vega and Josef Díaz were the true and lawful owners of the said Brig Esperanza, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises laden on board the said brig at the respective periods of time before mentioned, and now are the true and lawful owners thereof, which said brig is, as the claimants are informed and believe, described in the Libel aforesaid as a certain brig of an unknown name, found floating upon the high seas and within the Admiralty and Maritime jurisdiction of this Honorable Court, and since brought to Boston aforesaid.

Fourth. That the said Antonio Vega has seen and been on board of the said brig mentioned in these proceedings as of an unknown name, now lying in the port of Boston aforesaid, and therefore well knows, and hereby alleges, that the said brig and the brig Esperanza several times hereinbefore mentioned were and are one and the same ship or vessel and not divers.

Fifth. That the paper writing hereto annexed, marked with the letter A, is the original bill of lading subscribed by the said Antonio Vega for the aforesaid cargo of the said brig; and that the said bill of lading is in every respect true and genuine.

Sixth. That all and singular the premises are true; in verification whereof, if denied, the Claimants crave leave

to refer to the depositions and other proofs to be by them exhibited in this cause.

WHEREFORE the Claimants pray, that this Honorable Court, after awarding to the Libellants meet and competent salvage, would be pleased to decree restitution of the said brig and her cargo to the Claimants, and otherwise right and justice to administer in the premises.

(Signed) ANTONIO VEGA,
JOSEF DIAS,
by ANTONIO VEGA.

C D, *Proctor.*

DISTRICT OF MASSACHUSETTS, SS. ———.

Sworn to by the said Antonio Vega before me.

JOHN W. DAVIS, *Clerk.*

[Here annex the Bill of Lading.]

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